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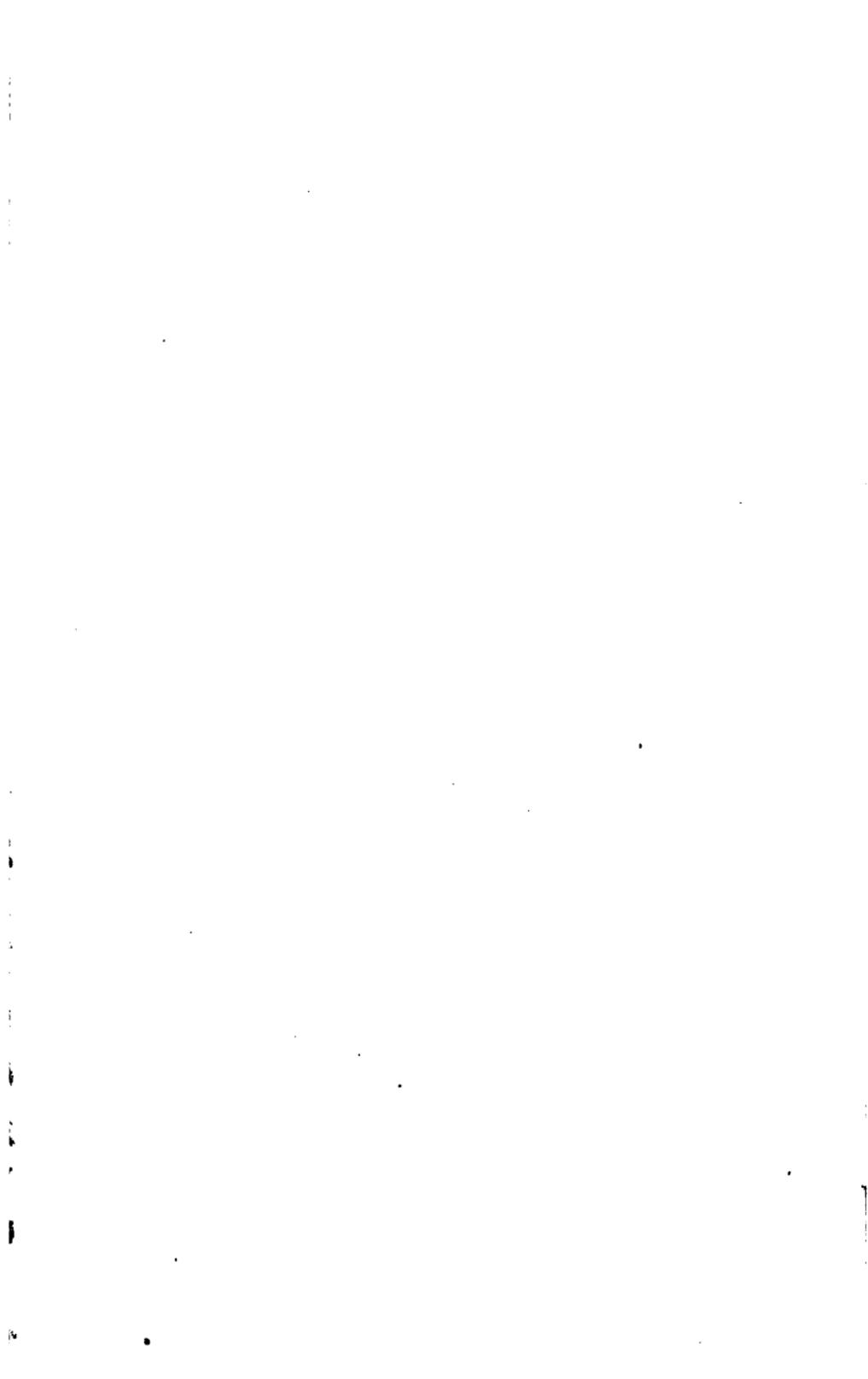
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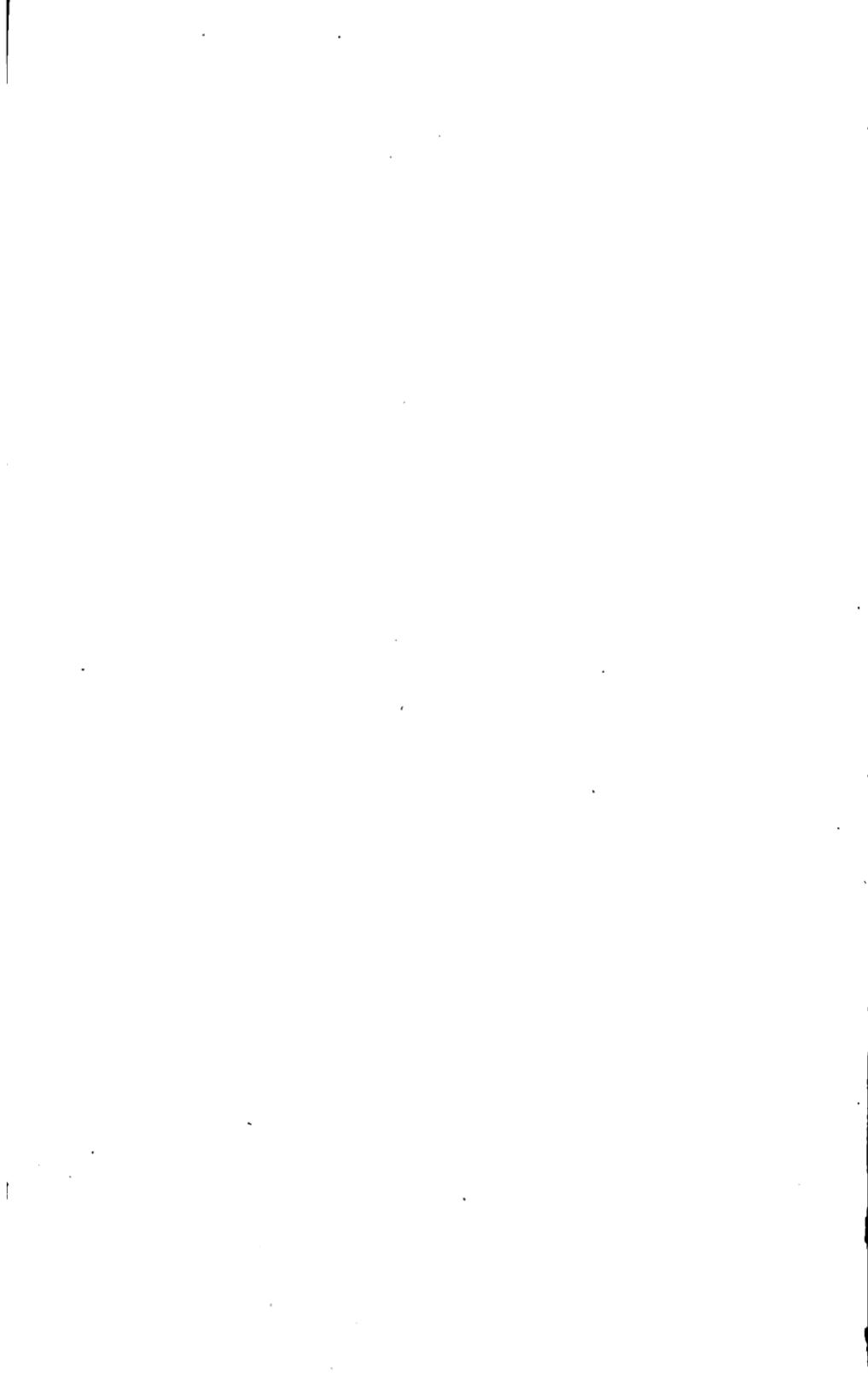
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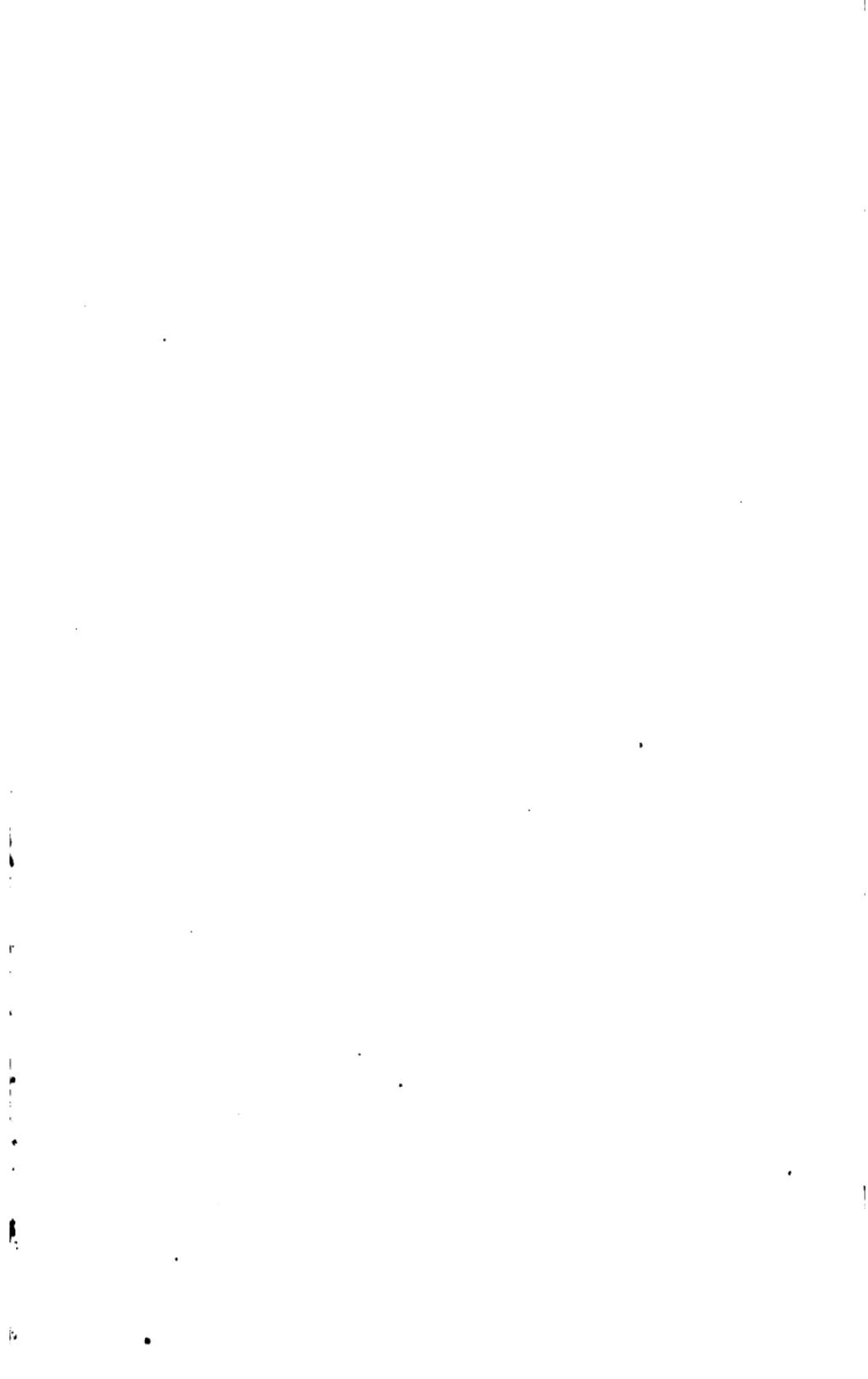


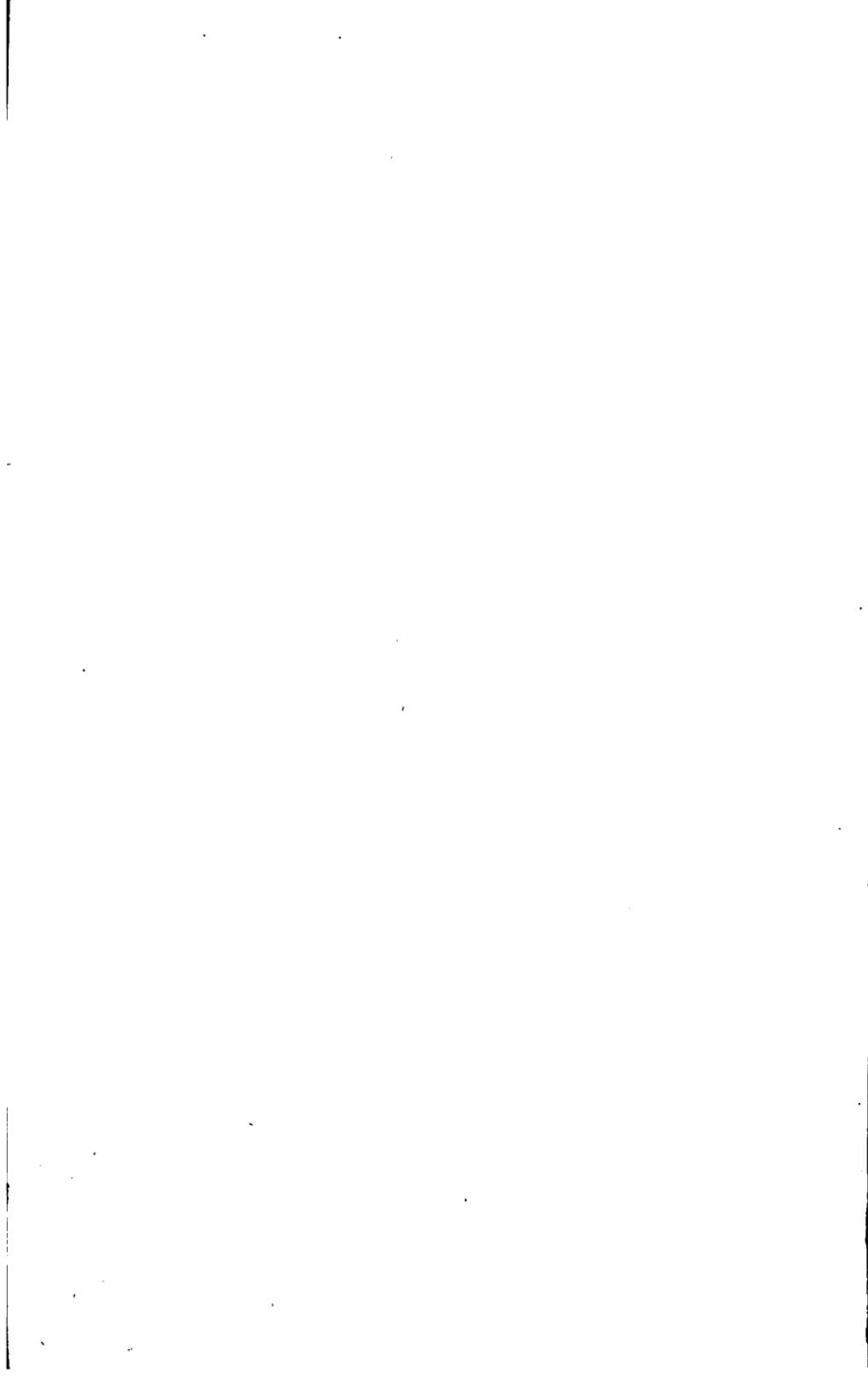


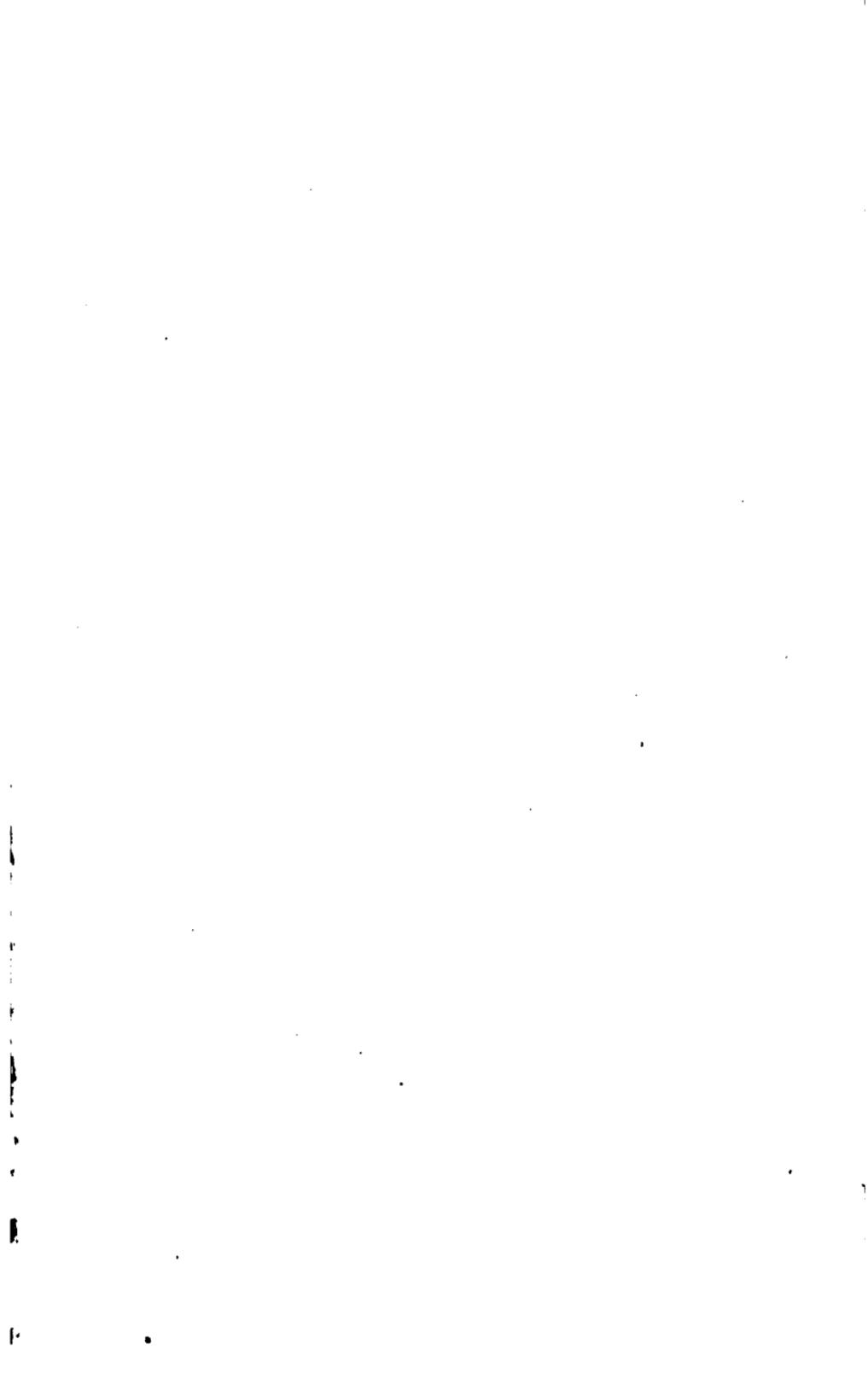












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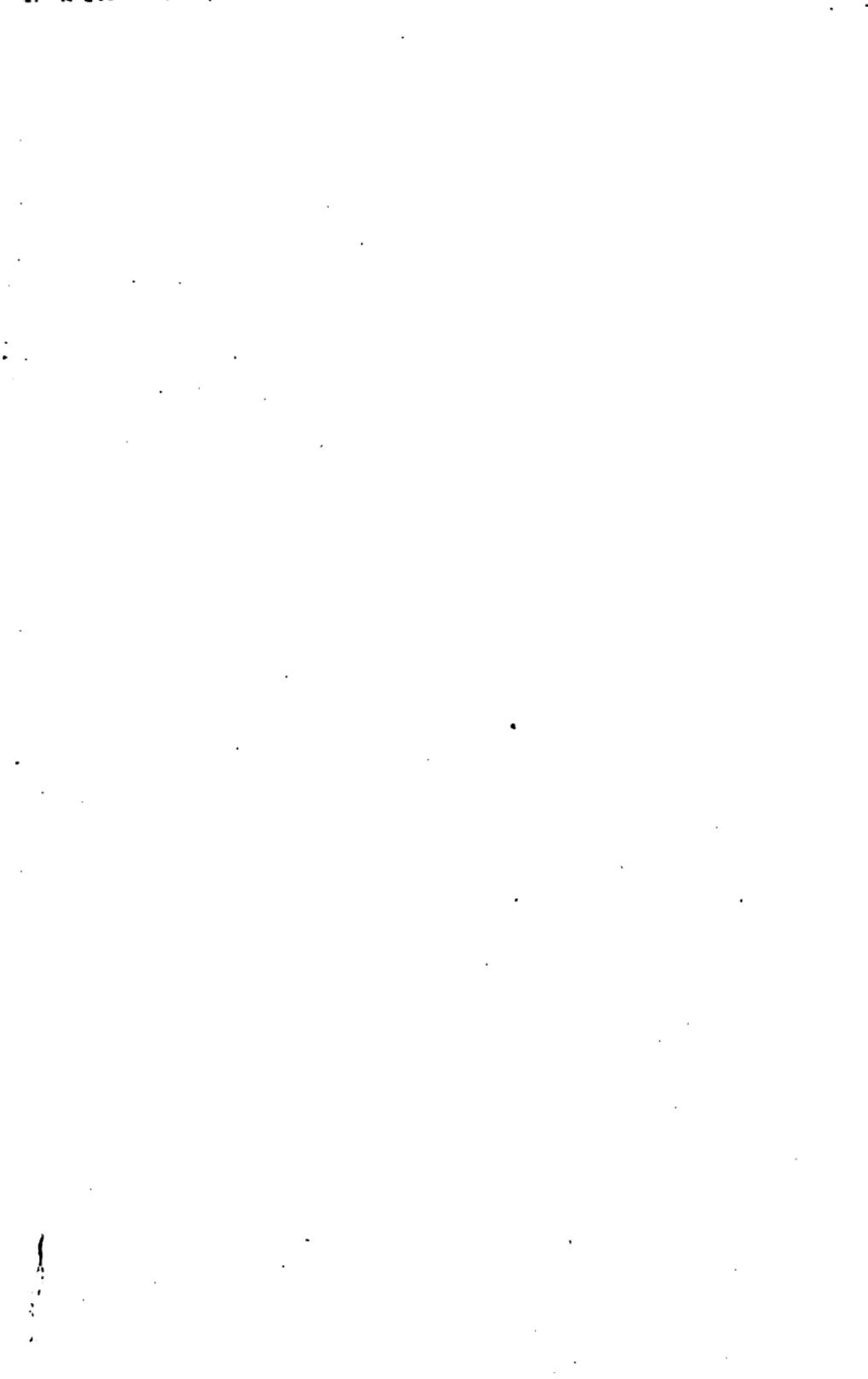
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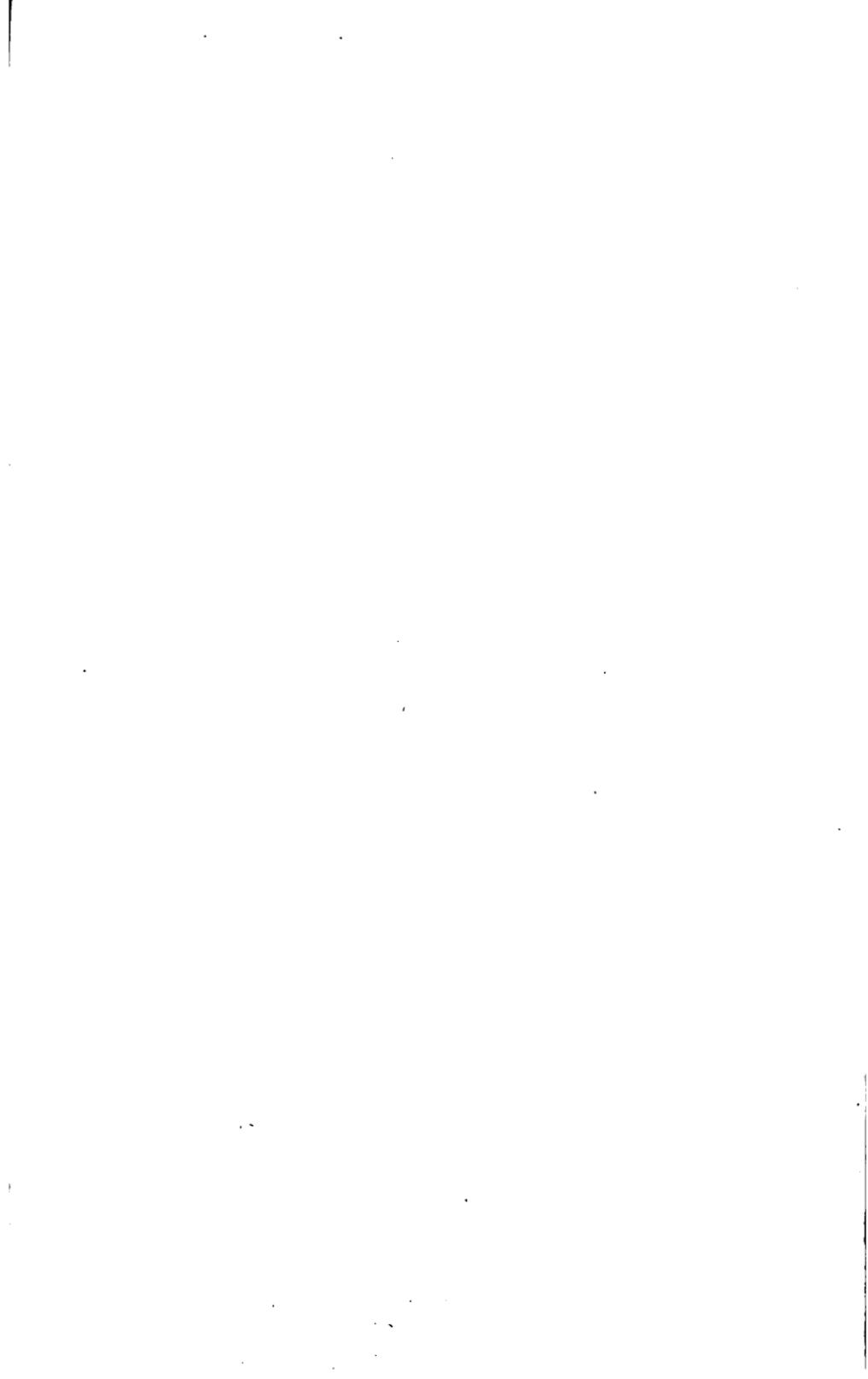
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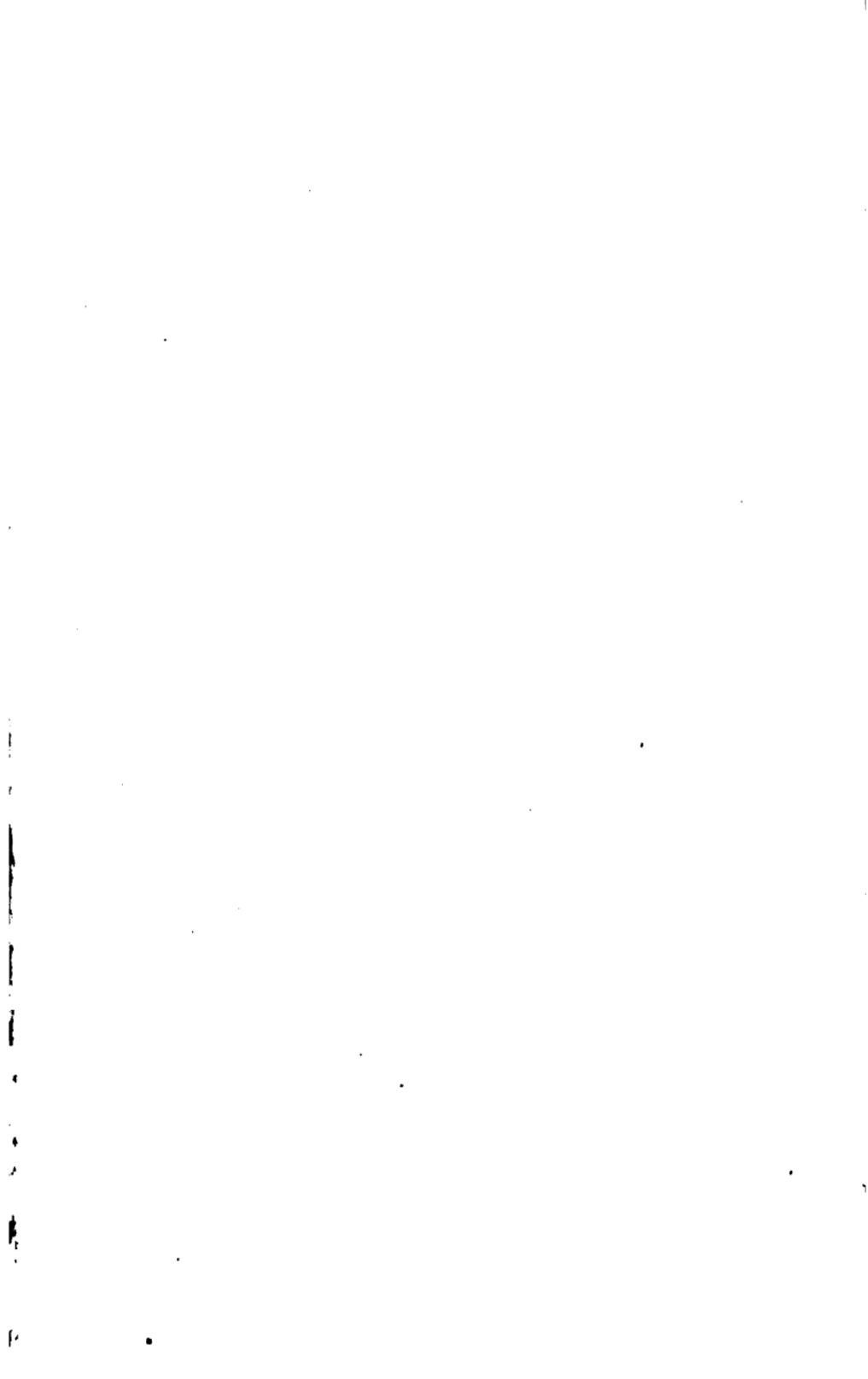
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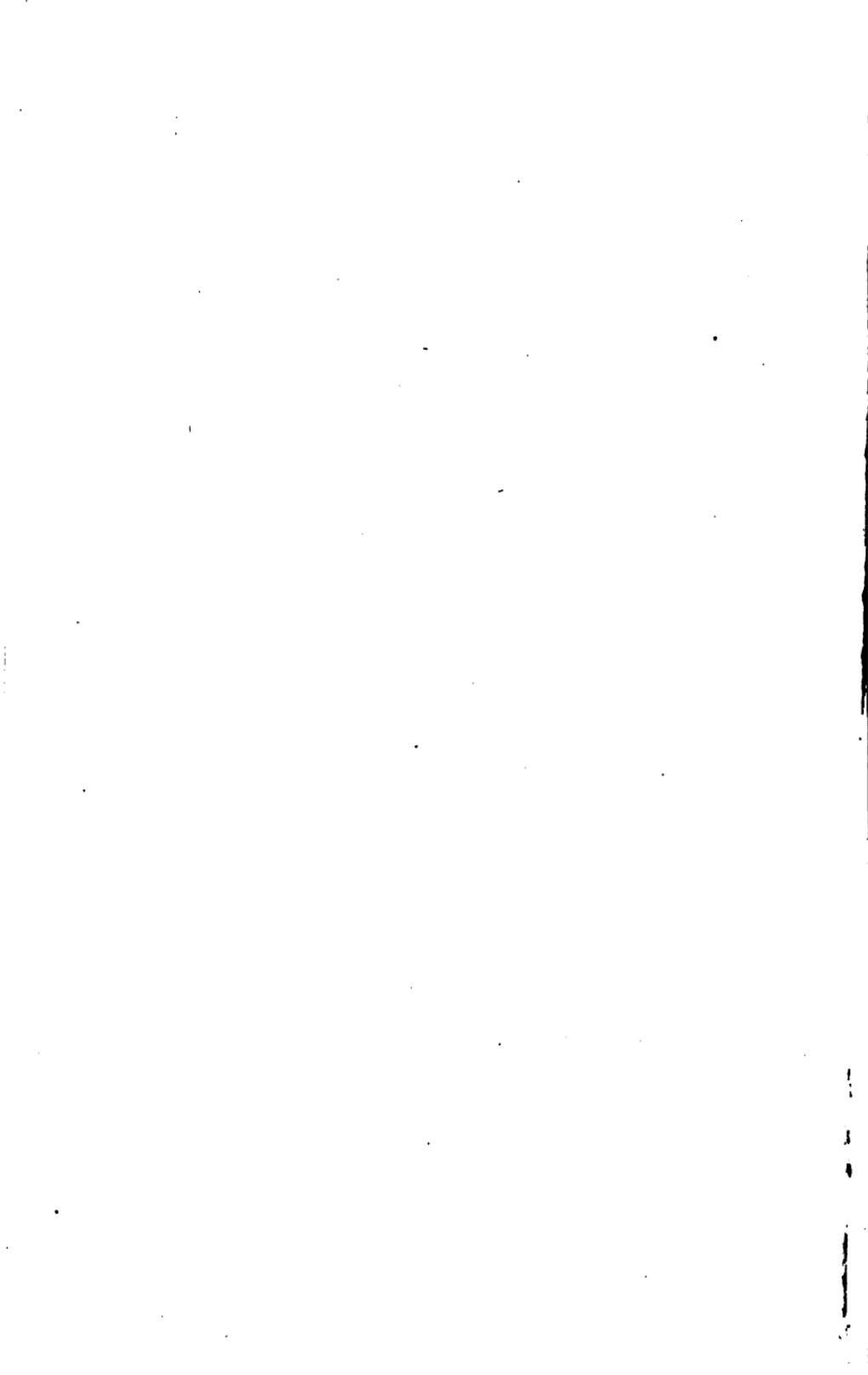
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FORENSIC ORATORY

A

MANUAL FOR ADVOCATES

BY

WILLIAM C. ROBINSON, LL.D.

PROFESSOR OF LAW IN YALE UNIVERSITY, AUTHOR OF "ELEMENTARY
LAW," "THE LAW OF PATENTS FOR USEFUL INVENTIONS," ETC.

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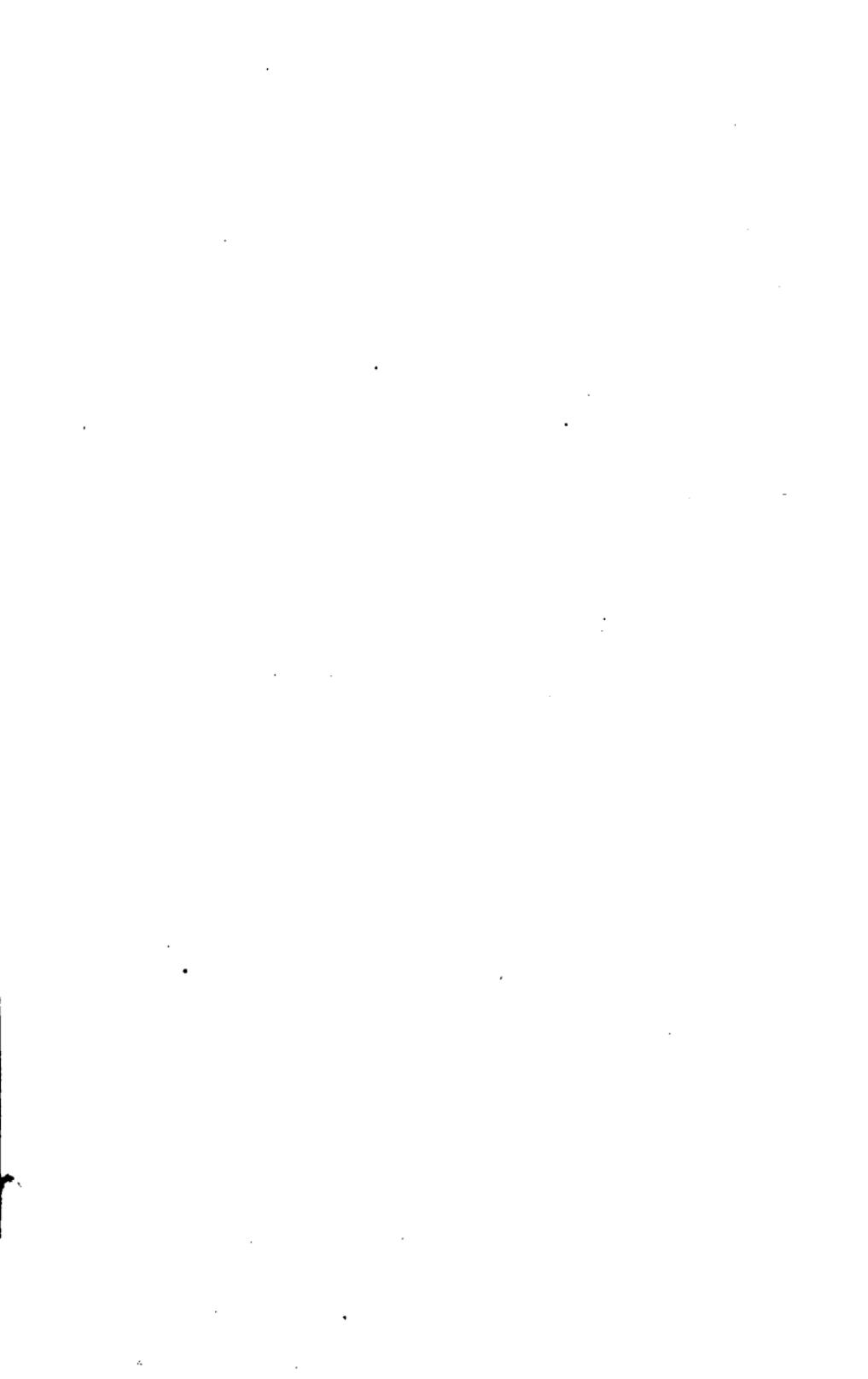
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In Memoriam

A. E. R.

**THE LAST OF WHOSE LIFE-LONG LABORS
WITH AND FOR THE AUTHOR
THIS VOLUME CONTAINS.**



P R E F A C E.

I HAVE written this book in order to assist law students and young lawyers in preparing themselves to discharge in a proper manner their duties as advocates. For more than forty years I have been a frequenter of court-rooms, and have studied the modes in which the trials of causes are conducted from the various points of view of a spectator, a court officer, a participating counsel, and a judge. The conviction was long since forced upon my mind that the enormous waste of time and energy involved in these proceedings is due to a want of method in preparing and presenting causes, whereby the conflicts of the forum, which should consist in the concentration of well ordered forces on the exact points of attack and defence, degenerate into a guerilla warfare of indefinite duration, characterized by irregular and often fruitless sallies, surprises, and retreats. Acting upon this conviction, and seeking for the method in which a legal contest

ought to be conducted, I was led to compare the modes of operation, adopted by advocates who had become noted for the celerity and certainty with which they won their cases, with the method and the rules prescribed by writers on the Art of Forensic Oratory, especially by Cicero and Quintilian, and became satisfied that, whether consciously to themselves or not, these advocates pursued that method and obeyed those rules. If this be true, nothing is more desirable than that young advocates should be well trained in the principles and practice of this art, and for that purpose I have brought together in this volume the substance of whatever I have found already written on the subject, and of such additional conclusions as I have derived from personal observation and experience. That it may help to serve this purpose, and also meet with some approval from advocates who are qualified to judge of its merits and defects, modesty does not forbid me to hope.

But by no means would I lead the student to believe that his examination of the Art of Forensic Oratory should be confined to the treatise with which he is here presented. On the contrary, the study of Logic, Rhetoric, and Elocution, on a far more extensive scale than the limits of this volume

permit, I must strenuously recommend. Nor is there a work on Advocacy or on any one of its subordinate topics, nor any book of Trials, nor any able novel in which the operations of skilful advocates and detectives are described, that he may not profitably read as illustrating and applying the rules and methods which this manual inculcates and explains.

WILLIAM C. ROBINSON.

YALE UNIVERSITY,
April 12, 1893.



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INTRODUCTION.

IT is a common opinion that Oratory, as a great social force, belongs to an inferior stage of human development, and, therefore, that as civilization has advanced eloquence has necessarily declined. This opinion is, to a certain extent, undoubtedly correct. The orator and the poet are no longer, as they were in ruder ages, the chief teachers of the people, furnishing to the community its governing ideas, and exercising over its mental operations an almost absolute control. The art of printing now affords to the thinker the readiest means of conveying thought, and offers to the scholar a method of acquiring knowledge far more convenient and available than any kind of oral communication. The general diffusion of intelligence, by gradually delivering man from the dominion of his passions and enthroning reason as the mistress of his actions, renders him less susceptible to sudden impulses, whether engendered by ideas suggested to him from without or from within. The wonderful energies of the newspaper and periodical press so widely and so quickly disseminate information upon all topics of social, political, and private interest, that in every assemblage there are many who approach the subject of the hour with preconceived opinions, which the most eloquent persuasions would fail to overcome. The extension of commercial relations, the consequent growth of international law, and the more settled and orderly condition of civil society, have made infrequent those occasions of public excitement which give to the orator a worthy theme and an eager auditory. The

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constant infliction upon the people of ill-considered thought and untrained elocution from the platform, the pulpit, and the bar has deadened their sensibility to human speech, and disposed them to regard its artifices with suspicion and contempt. By all these causes the opportunities and influence of oratory have been more and more restricted, and its value as a social force has been correspondingly diminished.

It is, however, true that every age and every nation has its orators, — men whom the most cynical critic never dreams of confounding with the common demagogue, and to whom the learned and the illiterate pay equal honor. Every great national emergency finds some mind to appreciate and some tongue to express its momentous issues, and to such orators the multitude still lend willing ears, and accord the homage of obedient hearts. Whatever coldness may have crept into our modern blood, however dormant lie within us those impulses which at the call of ancient oratory woke to triumph over tyranny and wrong, when any strong convulsion shakes the state, and liberties and institutions are imperilled, the voice which warns us of the danger and urges us to action meets a response as swift and vigorous as Athens gave to the fierce summons of Demosthenes. Be it that learning has increased and passion lost its sway, that educated tastes demand a higher and more cultivated oratory; when the hour and the man have come the populace are still but puppets in his fingers, and move according to the promptings of his will.

That which is true of oratory in general is even more true of Forensic Oratory. The forum is no longer as of old a great arena for oratorical display. The increase in the number and complexity of civil causes, the determination of many issues by single judges, the devotion of so large a proportion of the profession to office and chambers practice, the meagre interest manifested by the people in our public trials, and, perhaps more than all, a general feeling that time

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devoted to rhetoric and elocution could be better spent in legal study and in the acquirement of a knowledge of affairs, have tended to exclude oratory from among the necessary accomplishments of the successful lawyer, and led us to regard its cultivation as a matter more of taste than duty.

Yet for the lawyers who aspire to become advocates, as in their youth at least almost all lawyers do, the cultivation of the art of oratory is still absolutely necessary. The proper oral presentation of a cause to a court or jury requires no small degree of skill and wisdom. Unlike all other orators, the advocate addresses auditors who have no personal concern in the question he discusses, and whose interest in his cause depends upon the clearness of his argument and the effectiveness of his appeal. Judges and jurors are but men, having the same natural indifference to what does not directly affect themselves as other men; and whatever may be their disposition to do their exact duty, they need assistance in ascertaining what their duty is, and in overcoming the prejudices or sluggishness which hinder them from doing it. It is the office of the advocate to furnish this assistance, to arrest their attention, to interest them in the questions which they are to determine, to lead them step by step to the conviction that his claims are just, and thus to compel them to award their judgment in his favor. It is immaterial whether the issues are presented on a simple motion or an interlocutory controversy or on the merits of the cause itself, or whether the tribunal by which they are to be decided is the court or jury, his function is always the same. He has no occasion to speak except that he may explain, convince, and persuade; and unless his oration accomplishes these objects, he has occupied the time of the tribunal and expended his own strength in vain.

The performance of this function by the advocate involves the exercise of faculties whose development depends almost

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entirely upon artificial training. With whatever capabilities nature may have endowed him, the methods in which he must employ them in order to influence the minds and wills of other men are discoverable neither by reasoning nor by intuition, but only by experience. Fortunately for him, these methods, which constitute the Art of Oratory, have been the subject of investigation from the dawn of civilized society, and many of the rules in which they are expressed are more venerable than those of any other science. During the ages of history human nature has undergone no essential change. The impulses which determine its actions, the mental processes by which those impulses are aroused and stimulated, the modes in which the orator by speech and action calls these mental processes into effective operation, remain the same in every generation. All the accumulated knowledge of the past, with all the illustrious examples of the application of that knowledge, thus lie before the orator of our day for his guidance and instruction. He is confused by no diversities of theory, misled by no conflicting rules of practice. His teachers, ancient and modern, are in harmony both as to the condition of intellect and will into which he must endeavor to lead his hearer, and as to the methods by which that condition is to be produced. Nothing is wanting but the personal zeal and perseverance through which alone he can appropriate these stores of knowledge, and discipline his faculties into the spontaneous adoption of these methods to which all the successes of oratory have been due.

The present treatise is the result of an attempt to place within the reach of youthful advocates a knowledge of the Science and the Art of Oratory, with especial reference to its forensic use. The First Part is devoted to a statement of the general methods of the Art of Oratory, with the reasons upon which they rest and the effects which they are calculated to produce, together with such other topics as are introductory to the detailed study of the art. In the Second Part, the

INTRODUCTION.

various processes which constitute the art of Forensic Oratory are described, explained, and formulated into practical rules. In the preparation of the treatise the author has drawn from every source available to him, recognizing the fact that in the nature of things he could have few original ideas to offer, and that his task would be fulfilled if he presented to his readers the established rules and doctrines in a convenient and intelligible form.



FORENSIC ORATORY.

PART I.

OF THE THEORY AND PRACTICE OF ORATORY IN GENERAL.

CHAPTER I.

OF THE NATURE AND PURPOSE OF ORATORY.

§ 1. Purpose of Oratory to Move the Will.

The Art of Oratory is the art of persuading by spoken words. That which distinguishes oratory from every other species of discourse is its purpose of persuading, or moving the will. Oratory is not philosophy, nor is it poetry, though in its demonstrations it sometimes pursues the methods of the one, and in its appeals employs the imagery of the other. It does not attain its end when it instructs nor when it pleases, but when it leads the hearer to perform some proposed physical or mental act. Its province is to conquer men by an immediate struggle, and to control their conduct, not by the application of exterior force, but by exciting and directing those interior forces from which all voluntary action springs.

§ 2. Will Moved by the Emotions.

The forces which directly act upon and move the will are the impulses or emotions of the heart. While these are dormant the will remains in equilibrium, and volition ceases. Every activity of impulse disturbs this equilibrium, excites

volition, and, in the absence of opposing impulses, determines its direction and intensity. When active impulses conflict, volition is again suspended, until the strongest impulse overcomes the rest, and thus obtains control over the will.

§ 3. Emotions Excited by Ideas Operating on the Mind.

Impulses are engendered in the heart by the operation of ideas upon the mind. Any idea, clearly conceived and fully comprehended by the intellect, awakens in the heart certain emotions which naturally correspond to that idea. Whenever these emotions dominate the will, the action which expresses that idea will be attempted, and, if possible, will be performed. Every voluntary act thus has its origin in an idea, operating upon the mind of the actor, and producing in his heart an impulse which is strong enough to move his will.

§ 4. Energy of Emotions Dependent on the Energy with which Ideas Operate on the Mind.

The strength of an emotion depends upon the energy with which its genetic idea operates upon the mind. The simple apprehension of an idea, though it awakens impulse, rarely arouses it into controlling power. Other ideas, which simultaneously or successively present themselves, also excite their proper impulses, and in the multitude of varying emotions the supremacy of one becomes impossible. But when an idea takes entire possession of the mind, absorbing all its faculties, the impulses which it engenders exclude or stifle every other impulse, and exercise an undivided sovereignty over the will.

§ 5. Energy of Ideas Dependent on the Nature of the Idea, the Susceptibility of the Hearer, and the Mode of Presentation.

The energy with which an idea operates upon the mind is determined partly by the character of the idea itself, partly

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by the previous condition of the mind on which it operates, and partly by the earnestness and force with which it is presented. Some ideas excite emotions which are able to control the will only when it is wholly free from contravening impulses, while other ideas arouse emotions so intense that every hostile impulse perishes at once, and the will moves with instantaneous submission. The same idea impresses different individuals with different degrees of force, according to their natural or acquired susceptibilities. The energy of an idea, however weak, may be indefinitely augmented by its vivid and continuous exhibition to the mind, while ideas which are in themselves most powerful become feeble and ineffective when obscurely presented or impotently urged.

§ 6. **Oratory Moves the Will by Presenting the Ideas Calculated to Excite those Emotions which will Produce the Act desired.**

In its endeavors to control the acts of men, oratory attacks the will through these ideas and impulses. Having in view a definite end, and purposing to attain that end through the voluntary operations of the actor, it singles out the impulses by which his will can most effectively be moved in the direction of the act proposed, and the ideas by which those impulses can be most speedily and vigorously excited. These impulses it then arouses and inflames by vividly and forcibly presenting those ideas to his mind, until opposing impulses are overcome, his will is subjugated, and his performance of the act secured.

CHAPTER II.

OF THE LIMITATIONS OF ORATORY.

§ 7. Oratory can Employ only Noble Ideas and Emotions.

In its employment of ideas and impulses oratory is limited by its own nature, and by the intellectual and moral characteristics of its auditors. True oratory counts among its lawful weapons only those noble impulses which are born of just and excellent ideas. With the base passions which are the progeny of low and sensuous ideas it has no sympathy, no common aim. It recognizes that the emancipation of the will from the latter and its entire subjugation to the former is the one object of the discipline of life, and the sole ultimate benefit which social forces can confer upon mankind. Itself the most potent of these forces, it can never, for the sake of temporary ends, promote the sovereignty of passion, or urge the will toward vicious or degrading actions. This is especially true of forensic oratory. The advocate is the minister of the law, the instrument and guardian of justice. In his assertion of the right, in his defence against the wrong, passion is always his antagonist, and not his ally. So far from evoking it that he may trade upon the baseness of his hearers, it is his duty to deliver them, at least for the time being, from its thraldom, that with unclouded minds they may perceive the truth, and with unfettered wills may zealously pursue it.

§ 8. Oratory can Employ only Ideas Suited to the Hearers.

The intellectual and moral characteristics of its hearers narrow still further the resources of oratory. An audience is not a group of empty vessels into which the orator can pour

his thought, certain that it will there retain its purity and power. On the contrary their minds are occupied already with ideas which form a solvent for every new idea that may be presented to them, and their hearts are pregnant with emotions which have hitherto controlled and still control their wills. No new idea can be received into and operate with energy upon their minds unless it is consistent with these preconceived ideas, nor can their impulses be roused unless the thoughts suggested by the orator are those to which their hearts instinctively respond. The orator must, therefore, always speak to these intellectual and moral characteristics of his hearers, and on the basis of these previous ideas and impulses erect the fabric of his demonstration and appeal, or he will have no right nor reason to expect success.

§ 9. Selection of Suitable Ideas Difficult for Want of Knowledge of the Audience.

Two serious difficulties here confront the orator. The first arises from his ignorance of the intellectual and moral characteristics of his auditors. No man can ascertain, except by long and intimate companionship, the secret thoughts and impulses of another, and even then some special idiosyncrasies will be so rarely manifested as to remain substantially unknown. The hearer is thus always, to some extent, an uncertain quantity. However diligent the inquiry concerning him, however close the observation of his habits and peculiarities, some preconceived idea, some ruling impulse, will escape detection, and leave the orator in constant danger of failing to excite his interest, if not also of arousing his hostility.

§ 10. Selection of Suitable Ideas Difficult from Varied Character of the Audience.

The second and more formidable difficulty arises when the orator addresses an assemblage composed of individuals

whose intellectual and moral characteristics are dissimilar. To move this mass of men, each individual among them must be moved. The ideas which the orator presents must operate with absorbing energy on every mind, and awake controlling impulses in every heart. Yet such are their diversities that an idea directed to the distinctive thoughts and impulses of one can rarely, in the same manner and to the same degree, affect another. In such an audience there is no collective mind which oratory can approach unless their various peculiarities are temporarily eliminated. Like other fractions, these individuals can never be combined into an active integer until they have been first reduced to a common denominator of homogeneous ideas and dispositions.

CHAPTER III.

OF THE FIELD AND DIVISIONS OF ORATORY.

§ 11. Oratory Adapts itself to its Limitations by Employing only Universal Ideas and Emotions.

Fortunately for the success of oratory, although its limitations cannot be removed, the difficulties which create them may be avoided. There are in human nature certain fundamental principles of thought and action ; certain universal ideas by which men measure the truth or falsehood, the value or insignificance, of whatever other ideas may be presented to them ; certain universal impulses which are the same in all men and are constant in every man, and which under uniformity of circumstances result in a substantial uniformity of conduct. The truth of any particular idea is conceded the moment it is seen to be identical with, or included in, any of these universal ideas ; and the will moves toward any action as soon as the mind recognizes it as belonging to that class of actions to which these universal impulses naturally tend. It is in the field of these fundamental principles that the orator must labor. As he cannot know all the peculiar characteristics of his different auditors, and as if he did know he could not accommodate his utterance to the various characteristics of a numerous auditory, he must confine himself to that which he can know, and which resides alike in all. He must arouse those universal impulses, which in all men impel the will toward the contemplated act, by identifying the particular ideas embodied in that act with those ideas which in all men excite these universal impulses. He must address himself to the humanity, as distinguished from

the individuality, of his hearers, at once vivifying and controlling their thoughts, their emotions, and their wills.

§ 12. Universal Ideas and Emotions Spring from the Tendency of Human Nature toward Perfection.

That fundamental principle, out of which all noble impulses arise, is the tendency of human nature toward perfection. Every man naturally and necessarily inclines toward that which seems to him to be the highest good. The law of humanity is the law of aspiration to and movement toward a greater excellence, a clearer light. Nations and individuals alike intuitively struggle to obey this law, and to proceed from present good to an immediate better and a future best.

§ 13. Tendency toward Perfection Impels Man to Do his Duty, to Become Virtuous, and to Attain Happiness.

Perfection is predicable of human nature as to its action, as to its character, and as to its attainment. A man is perfect as to action when he fulfils his duty; as to character, when his predominant ideas and impulses are pure and virtuous; as to attainment, when he possesses the highest happiness which human nature is able to enjoy. And thus in actual life the fundamental tendency toward perfection manifests itself in three subordinate tendencies: the tendency toward duty, the tendency toward virtue, and the tendency toward happiness. These three subordinate tendencies exist in all the members of the human race. There is in every man a natural disposition to do that which he knows to be his duty. However weak this disposition may be, however insufficient to overcome the obstacles which hinder and the temptations which seduce him, it is forever present in him, and often needs only the encouragement and support of some exterior will to enable it to triumph. There is in every man a natural disposition toward virtue. His actual igno-

rance, his moral depravity, his habitual vices, may indicate the measure of his failure to attain it and the influence which a false training or corrupt associates have exerted over him, but in the depths of his interior nature this disposition still survives, and, if aroused and sedulously cultivated, displays its saving power. There is in every man a natural disposition toward happiness. His ideas of its constituent elements may be erroneous, his efforts to obtain it may be unsuccessful, but it is still the glittering prize which allures him on through all the schemes and struggles of his life, and the disposition to secure it is the force which determines both his character and conduct.

§ 14. **The Universal Ideas of Duty, Virtue, and Happiness Excite Certain Universal Emotions.**

These natural dispositions render the heart susceptible to certain impulses, each of which corresponds to some one of the many forms in which the ideas of duty, virtue, and happiness are presented to the mind. The idea of duty yet to be fulfilled awakens zeal ; of duty heretofore performed, complacency ; of duty which another has omitted, anger ; of duty as discharged by another, approbation. The idea of virtue as an attribute of character engenders admiration ; as exemplified in individuals, good will, esteem, friendship, or even love for them and emulation of their excellence ; as contrasted with vice, abhorrence of the vice itself and aversion or contempt toward those in whose character depravity is manifested. The idea of happiness as possible begets courage, desire, and hope ; as unattainable, despair ; as already possessed, joy ; as derived from others, gratitude ; as endangered, fear ; as denied to others, pity ; as prevented or destroyed by others, indignation. These are the universal impulses to which all men are subject. These are the weapons of the orator to which no human heart can ever be invulnerable.

§ 15. Every Voluntary Act Springs from One or More of these Ideas and Emotions.

The ideas by which the orator endeavors to arouse these impulses are determined by the nature of the contemplated act. A voluntary act may spring from one or many of these impulses, and embody one or all of these ideas. An act which is considered only as a duty to be done presents a single idea which excites a single impulse, zeal. But if the same act is a duty which was hitherto neglected, or tends to virtue or to happiness, or has already produced excellence and good to others, or if its omission has been followed by depravity or wretchedness, all these ideas and their resulting impulses may be combined to move the hearer to perform the act. The resources thus presented to the orator are numerous and varied. In nearly every form of oratory the act embodies several ideas, and affords opportunity for stirring many impulses whose united force can be concentrated upon the will.

§ 16. Voluntary Acts Elicited by Oratory are of Two Classes, Religious and Political.

The nature of those acts whose performance oratory endeavors to secure depends chiefly upon the place they occupy in the relations of the actor to society and to his Creator. Every man to whom oratory at any time addresses itself is a part of two great systems, the religious and the political. In the religious order, duty is obedience to reason, to natural law, and to the revealed will of God ; virtue is moral perfection ; happiness is present peace and future glory. In the political order, duty is legal obligation ; virtue is civic excellence ; and happiness is municipal or national welfare and prosperity. An act regarded as a duty to the state thus presents ideas entirely different from those embodied in the same act when considered as a duty toward God, and the motives which impel toward it as the one may have no place in the production of it as the other. The spheres of political

and religious oratory are thus widely different, and though attacking the will through the same impulses address the auditor with wholly different ideas and for entirely different purposes.

§ 17. Divisions of Oratory: Judicial, Demonstrative, Deliberative.

From the distinction between the three subordinate dispositions, in which the universal tendency of human nature toward perfection manifests itself, arises the division of oratory into Judicial, Demonstrative, and Deliberative Oratory. Judicial oratory relates to duty. It refers only to the present moment, and endeavors to secure the performance of a present act by enforcing present obligations. It excludes the ideas of praise and blame, of reward and penalty, and urges the discharge of duty simply as duty, and without reference to consequences. Demonstrative or panegyrical oratory relates to virtue. It regards the past, and rehearses the excellence and achievements of its subject that it may win for him the honor and the imitation of its hearers. Deliberative oratory relates to happiness. It contemplates the future, and urges the performance of an act, not on the ground of obligation or of merit, but as productive of such consequences as tend to personal or social welfare. The differences between these three divisions are essential, and were recognized even in the beginning of the art of oratory. And though it is consistent both with nature and the rules of art that in the same oration all these different forms may be employed, yet that one which gives to the oration its distinctive character must never lose pre-eminence. For every true oration is a unit. It is an effort devoted to the accomplishment of a single object, and animated by a single purpose, which concentrates within itself and endows with its own attributes all the material it uses, from whatever source derived, so that with its various weapons it may strike a single but decisive blow.

CHAPTER IV.

OF THE ART OF ORATORY.

§ 18. Art of Oratory Consists of Two Processes, Convincing and Persuading.

Oratory, whatever be its form, proposes to itself two objects: to convince the hearer that the contemplated act is his duty, or will promote his virtue or his happiness; to urge upon him the ideas which are embodied in that act with such force as to arouse in him a controlling impulse to perform it. The methods by which it accomplishes these objects constitute the Art of Oratory.

§ 19. Process of Convincing: First Step to Define the Proposed Act.

In order to convince the hearer that the proposed act is his duty, or that it will result in virtue or in happiness, it is first necessary to create within his mind a clear conception of the nature of that act itself. No proposition can be demonstrated unless the several members of which it is composed are already fully comprehended. The identity of the particular ideas embodied in the act with one of the universal ideas which exist already in the mind cannot be established until those particular ideas have been completely and intelligibly defined. Definition, therefore, must precede demonstration. If the proposed act is to be identified with duty, its elements must be described, and the nature of its obligations must be precisely stated. If its consequences are to be identified with happiness or virtue, its effects on character or condition must be accurately delineated. If the nature of the act or of its consequences depends upon

attendant circumstances, these circumstances also must be narrated, and their relation to the act must be explained. If its nature or results, or its attendant circumstances, are doubtful or disputed, the precise points of doubt or controversy, and the modes of their determination, must be indicated. In a word, the ideas embodied in and necessarily connected with the act must be so fully and particularly defined within the mind of the hearer that he perceives them as clearly and as comprehensively as does the orator himself.

§ 20. Process of Convincing: Definition a Species of Demonstration.

Definition is not only a prerequisite to demonstration; it is itself a kind of demonstration. The correct understanding of any question goes very far toward its correct determination. Such is the power of truth over the mind that its mere statement elicits a certain assent and acknowledgment. The exhibition of a particular idea to the intellect at once excites to operation the universal idea in which it is included. To perceive an act in the light of its obligations thus often produces the conviction that it is a duty. To apprehend the relations of its consequences to character or condition may alone satisfy the mind that its performance promotes happiness or virtue. And even when definition does not also demonstrate, the pleasure which the hearer naturally experiences on finding himself master of the idea of the orator inevitably predisposes him to yield to the actual demonstration that immediately follows.

§ 21. Process of Convincing: Definition Impossible unless the Orator himself Comprehends the Act Defined.

That the orator may define the proposed act to the minds of others he must himself have fully comprehended it. No one can give that which he does not possess, and worse than

useless is the labor of an orator whose own ideas are involved in confusion and obscurity. What he would now do for his auditors he must have done already for himself by an exhaustive research and a thorough classification. The perfect and precise conception in his own mind of the nature of the act which he desires his hearers to perform, communicated to them in language too plain and simple to be misunderstood, is the indispensable prerequisite to any demonstration that the act is one of obligation, or would improve their character or their condition.

§ 22. Process of Convincing: Second Step to Demonstrate that the Proposed Act Ought to be Performed.

To satisfy the hearer that the proposed act ought to be performed is the work of demonstration. It consists in the comparison of the particular ideas embodied in the act with the ideas of duty, virtue, or happiness universally existing in the human mind. Thus in religious oratory an act is shown to be a duty by comparing it with those rules of action which all men recognize as dictated by reason, by the law of nature, or by the revealed will of God. And in political oratory the consequences of an act are proved to be identical with happiness by comparing them with those conditions which are the acknowledged elements of civic welfare. When these particular ideas have been successfully defined and the definition is uncontroverted, and when the hearer is conscious of the nature and scope of these universal ideas, the act of comparison constitutes the entire demonstration, for then he sees at once that the universal idea embraces the particular, and consequently that it is his duty or his interest to perform the act. If the particular ideas are in dispute, and it is doubtful whether the act proposed is of the nature which the orator describes, as is often the case in forensic oratory, he must corroborate his assertions with sufficient proof. If the uni-

versal ideas, although existing in the mind of the auditor, are not clearly recognized by him at the time as infallible standards of comparison, they must be stimulated and developed until they are distinct enough to serve him as tests of the truth of the particular idea.

§ 23. Process of Convincing: Modes of Demonstration must be Simple.

The methods by which the orator thus identifies the ideas embodied in the act with the fundamental idea in the mind of the hearer are necessarily of the simplest character. The demonstration is to be heard, not read. Whatever it accomplishes it must accomplish during the instant that it falls upon the ear. The auditor has no opportunity to investigate its truth, to meditate on its results, or to elucidate its obscurities. While the orator is speaking it does its work, or leaves it undone forever. Hence it must be so perfect and intelligible as to involve no labor on the part of the hearer, and must present itself before his understanding in such clear and conclusive arguments that he assents to it without delay. It must employ those attributes of the universal idea which are most easily comprehended, and the exhibition of which beside those of the contemplated act will at once manifest their complete identity.

§ 24. Process of Convincing: Modes of Demonstration must be Such as the Hearer is Accustomed to Employ.

These methods, moreover, must be the same which the auditor himself is accustomed to employ. Different classes of men apply these universal standards to a proposed act in different ways, arriving at the same result, but using the same instruments in different modes. These habitual methods of demonstration must be discovered and adopted by the orator. The particular ideas which he selects as character-

izing the act must be those which his audience would perceive in the act if making the examination for themselves. Those elements of the universal idea with which he measures his particular ideas must be the same which they would regard as standards in deciding according to their unaided judgments. To establish by proof that the universal idea possesses certain attributes, and then to use such attributes as arguments in favor of the contemplated act, is a process that confuses and does not convince. On the contrary, such forms of this idea as are already familiar to the hearer, and naturally arise within his mind whenever questions of duty, happiness, or virtue are presented to him, furnish the proper and the only profitable arguments, all others being equally unintelligible and inconclusive.

§ 25. Process of Convincing: Philosophical and Mathematical Demonstrations Rarely Permissible in Oratory.

In general, therefore, philosophical and mathematical demonstrations have no place in oratory, their processes not only imposing severe labor on the memory of the hearer, but demanding the quickest perceptions and the strongest powers of reasoning. Such demonstrations not merely distract attention from the real object of the orator; they also puzzle even the most attentive of his auditors, and produce in them a sense of disappointment which is unfavorable to ultimate success.

§ 26. Process of Convincing: Modes of Demonstration Suitable to Oratory: *Argumentum ad Hominem.*

One of the most effective forms of oratorical argument is the *argumentum ad hominem*. This is a direct appeal to the consciousness of the hearer. It turns his thoughts to the contemplation of the universal idea as it exists in his own mind, and points out to him its attributes as familiar and

unchallenged principles. It does not endeavor to increase his knowledge otherwise than by suggesting to him that which is supposed to be self-evident, and leading him to compare his ideas of the act with the general idea as thus discerned. In this argument both the particular and the universal ideas are assumed to be clearly understood, and the question of identity between them alone to remain undetermined. It is, therefore, the proper argument in all cases where the act and the standard of comparison are already fully recognized, and the demonstration is to be completed by comparison alone.

**§ 27. Process of Convincing: Modes of Demonstration
Suitable to Oratory: Examples.**

Another valuable form of argument is that drawn from examples. Men naturally rely on the experience of others as a safe guide for themselves, and if an act has been performed by one whom they consider as worthy to be imitated, or has produced in other men the happiness or virtue predicated of its consequences by the orator, they are inevitably influenced by these examples to regard the act as of the character which the orator asserts. This form of argument is an act of comparison between the act proposed and the universal idea. It assumes that the auditor already understands in what duty, virtue, and happiness consist. It exhibits to him an actual instance in which these ideas have been realized by the performance of the proposed act, leaving him to conclude that its performance by himself would be attended with the same results. It is, therefore, a proper argument for cases in which the attributes of the universal idea are definitely established, but where the characteristics of the contemplated act, and their identity with those attributes, are doubtful or obscure.

**§ 28. Process of Convincing: Modes of Demonstration
Suitable to Oratory: Authority.**

The argument from authority is also an effective one in oratory. The mind instinctively yields to the authority of those who, on account of their superior wisdom, public services, or peculiar excellence, have attained a high position among their fellow men. The mere dicta of such individuals become often a most powerful argument, especially when these utterances have been accepted by many generations as infallible authority. The minds of most men receive such lessons of the past with great eagerness, and derive from them the most permanent and vivid of their impressions. This form of argument embraces the entire field of demonstration. It is, in effect, the assertion, on the part of the person whose authority is cited, that he has examined the ideas embodied in the proposed act and the elements which constitute the universal idea, and has discovered that they are identical. Hence its great value where the act itself is difficult of explanation, and must be identified with the less familiar attributes of the universal idea.

**§ 29. Process of Convincing: Demonstration must be
Brief.**

Whatever form of argument the orator adopts, the argument itself must be not only clear and simple; it must be also brief. The mind taught through the ear must be taught quickly, or the attention flags, the thread of thought is broken, and the force of the entire argument is destroyed. An argument must not efface its predecessor by mere weight of words, but, one following another in distinct but swift succession, each must add to the power and the conclusiveness of the demonstration, until it terminates in an impregnable conviction that the contemplated act should be performed.

§ 30. Process of Persuading : its Necessity.

Definition and Demonstration develop, in the mind of the hearer, the ideas embodied in the contemplated act, and identify them with the universal idea of duty, virtue, or happiness. They thus convince him that this act is his duty or will result in happiness or virtue, and produce within his heart an impulse to perform it. But to convince is not always to persuade ; and many influences may concur to prevent this impulse and idea from finding an expression in external acts. The purpose of oratory is not accomplished unless this idea is so presented that it takes entire possession of the mind, and operates upon it with such energy as to arouse emotions which control the will.

§ 31. Process of Persuading : Involves the Entire Oration.

This supreme purpose of the orator animates and characterizes the entire oration. From the moment he appears before his auditors, all his efforts are directed to this end. Every posture which he assumes, every thought which he presents, every word which he employs, every modulation of his voice, every look and gesture, has for its single object the increase of that energy with which the idea already operates upon the mind of his hearer, and the strengthening of the impulses which move him toward the contemplated act. Even in the most formal portions of his definition and his argument, his language and his manner are governed by the same design, for he defines and demonstrates only that he may persuade.

§ 32. Process of Persuading: Intended to Awake Attention, Excite Interest, and Compel Determination.

The method by which the orator causes an idea to take entire possession of the minds of his auditors is indicated by

the character of the result which he endeavors to accomplish. At the moment of their announcement to the hearers, the ideas embodied in the proposed act are either familiar or unfamiliar to them, and their dispositions toward it are either favorable, or unfavorable, or indifferent. The problem of the orator is to remove them from this state of entire or partial ignorance, indifference, hostility, or ineffectual good will, to a state of perfect knowledge and favorable determination. This process is necessarily a gradual one. Its first step is the incorporation of the idea embodied in the act into the existing ideas of the hearers, awakening their interest, removing prejudices, and making the idea consciously their own. It then exhibits the idea to them in various lights,—in its sources, in its consequences, in its relations, in every form by which the impression already made can be intensified,—until their entire attention centres on the act, and every impulse of their hearts tends to its instant execution. Proceeding thus step by step, and making each advantage which he gains a basis for still further operations, he progresses steadfastly toward his goal, carrying the hearers from one stage of persuasion to another, until from auditors, who at the best were not enemies, he has converted them into active and determined friends.

§ 33. **Process of Persuading: Orator must Identify Himself with his Hearers.**

In order to remove his hearers from their present attitude toward the contemplated act to one which will insure their endeavor to perform it, the orator must identify himself with them, and accompany them in their transition to the state desired. In vain will he summon them, from some distant height of thought or feeling, to follow his direction and accept his conclusions. He must descend to them in their ignorance or opposition, and lead them up to the summit of truth and duty. He must unite himself with them, make their thought his thought, their impulses his impulses, even their

prejudices his prejudices, that he may graft his thought on theirs, mould their impulses into his, and efface their prejudices with his truth. The orator who stands aloof from his audience, who regards them as his pupils or his subjects rather than his comrades, who discusses questions in a manner satisfying to himself but without adaptation to their tastes and dispositions, may instruct and please, may perhaps convince, but never can persuade.

§ 34. Process of Persuading: Sufficient for Orator to Identify Himself with General Characteristics of his Hearers.

The attitude of any individual hearer toward the contemplated act is, of course, usually unknown to the orator. But in every audience, in addition to the universal impulses which grow out of the tendency of human nature toward perfection, there is a certain body of prejudices, tastes, and dispositions which may with confidence be regarded as characterizing all. Reared in the same climate, nurtured under the same institutions, speaking the same language, reading the same books, educated at the same schools, engaged in the same general occupations, with the same traditions and the same social and religious standards, there is among them a community of thought and feeling which predisposes them to act alike concerning any measure that may be proposed. The average man of such an audience is a fair exponent of the intelligence, the prejudices, and the proclivities of all, and a knowledge of this average man sufficient for the purposes of oratory is always accessible to the orator, and must always be obtained. To the audience, as personified in this average of its intellectual attainment and prevailing impulse, the orator must accommodate his entire oration. He must present his ideas in such forms that they will be at once assimilated by his hearers. He must employ such illustrations as they understand, and use such words and phrases as are

familiar to their ears. He must avoid examples and allusions which render them conscious of their own ignorance. He must not contradict their prejudices, nor attack systems or theories which they hold in high regard. He must shun everything which calls their attention from his subject and directs it toward himself, or which in any manner reminds them of his superior wisdom or ability. He must refrain from overtaxing them by obscure images or intricate demonstrations, and from wearying them with platitudes or needless repetitions. An audience to whom an orator thus adapts himself always regard him as a friend, and, although usually unconscious of his influence upon them, are disposed to follow him in his conclusions, and finally to act as he desires.

§ 35. Process of Persuading: Orator must Adapt Each Part of his Oration to the Progressive Movement of the Minds of his Hearers.

The orator must not only adapt his method to his hearers, he must adapt it also to the process in which he is engaged. To move their minds and hearts with steady progress toward conviction and determination, his oration must pursue the same progressive movement. While no thought should be succeeded by another until its full effect upon the hearers is exhausted, and no new thought should be advanced until they are prepared for its reception, yet no digression or delay should be permitted. The orator has no use for an extended chain of reasoning, or for minute descriptions which turn aside the current of idea and impulse from their proper channel, and hinder rather than promote his aims. The brief narration, the known authority, the fit example, the quick, intense appeal, — these only are available to him, as with all his energies he urges on his hearers to the immediate performance of his will.

§ 36. Process of Persuading : Orator must Adapt Each Part of his Oration to the Changing Attitude of his Hearers toward the Proposed Act: Use of Rhetorical Figures.

During this constant progress the ideas and impulses of the auditor are undergoing constant change. Each new thought, and each new phase of thought, arouses in his mind new questions, which, although unspoken, the orator must recognize and solve. Every oration is in reality a dialogue, in which the doubts and objections of the auditor are so many silent interrogatories to which the orator audibly replies. To do this without monotony, to put the same idea in varied forms suited to the changing disposition of the hearer without apparent repetition, taxes all the arts of rhetoric. Those turns of thought and language, which are called the figures of idea and speech, here become indispensable. They are not merely ornaments, they multiply ideas by multiplying forms for their expression ; they make clear, by some happy word or sentence, what would otherwise demand a tedious explanation or extended argument ; they render palatable even the most unwelcome truths, and clothe the weakest thoughts with majesty and power. These, however, must also be adapted to the auditor. The rhetoric of the orator must be the rhetoric of his hearers. The figures they employ, the epithets and metaphors which characterize their habitual speech, however homely, however unpoetic, should be his figures also, and to depart from these into those higher and perhaps more perfect forms of speech which cultivated minds alone could comprehend, is to destroy his chances of success, and sacrifice to a fastidious taste the only object for which oratory contends. Figures must also be suited to the progressive character of the oration. Poetic figures, designed to please and gratify the mind, and on which it rests and meditates, have no place in oratory. Oratory is thought in motion, not at rest. It is

a living force urging and driving on the ideas and impulses of the auditor, and every thought and expression which it uses is pregnant with activity. No figure, therefore, is permissible that does not rouse and stimulate, that does not add to the momentum of the blows which the orator incessantly rains down upon the thoughts and feelings of his audience. These figures must be also fitted to the theme. A rhetorical figure which is unsuited to the subject, whether by its magnificence or meanness, is recognized at once as but a paltry decoration, and excites disgust. No rhetoric can be too grand, nor strike the hearer with surprise, nor even attract his attention to itself as art, if it is appropriate to the thought which it expresses, and finds him ready to receive it. And nothing, on the other hand, so vividly arouses his suspicions, and puts him on his guard against the orator, as to perceive that he is calling to his aid the artifices of the schools, and weaving cunning webs of words to catch the careless and ensnare the weak.

§ 37. Process of Persuading: Orator must Believe what he Asserts, and Feel the Emotions he Seeks to Arouse.

The orator who would thus persuade must be himself persuaded. In vain are all his efforts to adapt his words and ideas to his hearers, to move them steadfastly toward the contemplated act, and to follow all their changing moods with ever varying imagery, unless the ideas which he presents and the impulses which he endeavors to excite are operating and ruling in his own mind and heart. The orator who does not feel may yet convince, for the laws which govern human reasoning do not derive their force from human sympathy. But he who would arouse the hearts of men, who would influence their emotions and control their wills, must touch them with fire from the blazing altar of his

own heart. “*Si vis me flere, dolendum est primum ipsi tibi*,” was the maxim of the teacher of the art of poetry. And masters of the sublimer art of oratory have also said: “*Ardeat qui vult incendere.*” “*Prius afficiamur ipsi ut alios afficiamus.*”

CHAPTER V.

OF THE QUALIFICATIONS OF THE ORATOR.

§ 38. Qualifications of the Orator Extraordinary.

That an orator who aims thus to control the minds and hearts of men should be endowed with more than ordinary attributes, requires no proof. It is unquestionably true that any man, on an occasion of absorbing interest to him, may by his untrained speech subdue and rule an audience whose modes of thought and dispositions are identical with his ; for there are moments of emergency and inspiration which, for the instant, clothe the mildest and the weakest with almost superhuman powers. But the true orator does not depend upon emergencies or inspirations, nor are his auditors invariably identified with him in impulses or in ideas. He speaks to man, not men, and wheresoever he finds manhood he is able to convince and to persuade. He discusses questions in which his interest is as transitory as the breath which he exhales, and burns with emotions which are born and perish with the passing hour. His ideas and his impulses awake and sleep at the mandate of his will, and express themselves in words and actions which vary with the varying degrees and circumstances of mankind. In him all phases of humanity, all attitudes of thought, all tastes and tendencies, are faithfully reflected. He is literally all things to all men, for thus only can he enter into and control the hearts and minds of all.

§ 39. Qualifications of the Orator Chiefly Acquired by Discipline.

With one or two exceptions these necessary attributes are the result of discipline. In natural endowments individuals

may so far differ that a severer training may be requisite for one than for another, but there is none who can without self-cultivation transcend the narrow sphere of his own spontaneous ideas and impulses, and enter into regions of thought and aspiration where other minds habitually dwell. Only by stern, continuous effort can he gather and assimilate those stores of knowledge and experience, which enable him to apprehend and reproduce within himself the ideas and dispositions of his fellow men until for the time being he becomes identified with them. Only by unremitting and exhaustive cultivation of his capabilities of thought and of expression can he acquire the art of adapting his modes of speech to every grade and attitude of mind, so that upon his chosen subject, whatever be its nature, he can concentrate the intellectual and moral energies of all his hearers, and make them realize it as the supreme object of their interest and action.

§ 40. Qualifications of the Orator: A Good Character.

Among the most important attributes of the orator is excellence of character and reputation. Oratory is essentially a moral force. The universal impulses, through which it moves the will, are all developed from the tendency of human nature toward perfection. The ideas by which these impulses are generated correspond to the same moral standard, and participate in the same exalted tendencies. These excellent ideas and noble impulses the orator must possess within himself before he can impart them to his hearers. That the idea of duty can be so conceived as to operate with absorbing energy upon the mind, and thus excite a dominating impulse in the heart, when every natural thought and impulse is contrary to duty, is impossible. A good idea may be suggested to an evil mind, and noble impulses be stirred in a depraved heart by the persistent urging of another, but excellent ideas are not developed nor good

impulses aroused without external aid, except in one who is himself loyal to duty, a lover of virtue, a faithful pursuer of the highest good. Bad men may be great rhetoricians. Their words may sound or read like oracles from heaven. But that irresistible moral force, which springs only from conviction of the truth and from desire to reproduce the truth in others, and without which oratory never moves the will, however much it entertains the intellect and pleases the imagination, — that force is wholly wanting. Upon the altars of such hearts the fires of duty, happiness, and virtue burn no longer. No living coals from them can kindle kindred fires within the hearts of others.

§ 41. Qualifications of the Orator : A Good Reputation.

This excellence and nobility of character in the orator must be also known to his auditors. Their confidence in his sincerity and honesty of purpose is indispensable to his success. Under whatever circumstances and on whatever subject he addresses them, their knowledge of his intention to persuade them rouses their independence and renders them instinctively suspicious of his methods, and this suspicion and hostility are overcome only when they are satisfied of his reliability and of his disposition to be truthful and sincere. This confidence established, they are no longer conscious of his individuality ; they seem to themselves to think what he in reality suggests, to attain by their own reasoning the conclusions which he draws, and to feel naturally the emotions which he constantly inflames. Thus having yielded to his hands the helm of thought, their minds and hearts reflect the ideas and impulses of his, and when at last they will to do the act which he desires there is no recognition on their part that their volition is not free and uncontrolled. That, with the inconsistency between the reputation of the orator and his professions staring them in the face, the auditors can ever feel this confidence in him, as their friend and guide, is

utterly incredible. The known violator of duty, the known enemy of virtue, the known promoter of misery and wrong, tolerated though they may be while treading silently in the beaten track of their own vices, excite a storm of indignation and rebuke if they appear as the apostles of obedience, excellence, or happiness. So far from persuading, they disgust, antagonize, repel. And even when the character of the orator is doubtful, and the natural resistance of a mind jealous for its freedom is supported only by a suspicion of his insincerity, the empire which he seeks over the will is never gained. That such men have dazzled audiences with the splendor of their rhetoric and elocution, that where they flattered vanity and fostered passion, or even where they stimulated impulses already roused and advocated measures already grateful to their hearers, they have witnessed the performance of the acts which they proposed, must be conceded. But that an orator of evil life and ill repute has ever so wrought on the nobler impulses as to persuade an audience previously hostile or indifferent to work his will, may safely be denied. History affords no example in which mankind have trusted in and followed a leader whom they believed to be dishonest, or have willingly received instruction as to truth and duty from a teacher who was known to be corrupt and wicked. It is not, therefore, without reason that the definition of the orator, put by Quintilian in the mouth of the elder Cato, has always been recognized as expressing his essential characteristics: "Vir bonus, dicendi peritus."

§ 42. Qualifications of the Orator: Knowledge of Human Nature.

Another essential qualification of the orator is a thorough knowledge of human nature. Even if the artisan in wood or brass or iron could be forgiven for his ignorance of the material on which he labors, the orator could find no fit excuse

for his own ignorance of the far grander and more complex material on which his efforts are employed. Human nature is the soil in which he delves. To him the knowledge of its constituent elements, of the proper methods of its cultivation, and of the seeds whose germination yields the surest harvest, is absolutely necessary. He must be conversant not only with those universal characteristics which are common to mankind, but with the special characteristics which distinguish different classes and communities of men. He must understand the language which the human features speak, and read upon the faces of his hearers their transitory as well as their habitual dispositions. With the experienced wisdom of the sage he must blend the intuitions of a child, that the souls of those whom he addresses may be laid bare before his vision as if their owners held them naked in their open hands. A knowledge of human nature such as this can never be obtained from books alone. Study of these may fit him to observe, and may impart to him the fruits of observations made by others. But the great volume of humanity which lies before him is the manual from which he must learn this portion of his chosen art. The man who is a bookworm or a solitary can never be an orator. The orator must study men. He must dwell with and contemplate mankind, not as a mere spectator, but as an active and interested sharer in their aims and hopes, their disappointments and their fears. He must participate, so far as may be, in the experiences which fall to men of every rank and station, that their results in his own mind and heart may teach him what effects they have produced on those by whom they are habitually encountered. He must subject himself to contact with the lowest and most ignorant, as well as with the learned and refined, that every page in his great handbook may disclose to him its own peculiar lesson and make him thoroughly familiar with the subject which it concerns him most to understand.

§ 43. Qualifications of the Orator: Earnestness.

Another important attribute of the orator is earnestness of character. The influence of an orator over his audience depends largely upon the energy with which his ideas operate on his own mind, and the force with which his impulses act upon his will. A cold and stolid nature, however intellectually acute and morally correct, fails to unite its hearers to itself in those strong bonds of sympathy which exclude the consciousness of separate individuality, and cause their different ideas and emotions to become the common property of both. An earnest, tender, and magnetic disposition wins its way immediately into the hearts of men, and through those subtle chords which intense feeling in the speaker always wakens in the hearer reaches his thoughts and impulses with a directness and a vigor which sterner dispositions are unable to attain. This attribute, more than any other of those necessary to the orator, is the gift of nature. It is the distinguishing characteristic of the purely natural orator, and gives to him an influence which nothing else can rival. It is not, however, wholly denied to sedulous cultivation, even when originally wanting. That constant intercourse with men, that familiarity with their joys and sorrows, which first produces self-forgetfulness and then an earnest interest in their welfare, by slow degrees begets and fosters those sympathies whose operation on the heart, and whose expression in the words and manner, of the orator constitute this rare and fascinating quality. But, on the other hand, this earnestness and tenderness of nature must not be excessive. An orator whose disposition is so sensitive that his ideas engross his mind and heart and render him neglectful of the results produced on others, or whose emotions manifest themselves in words or actions which attract attention from the thought uttered to the speaker, labors under a disadvantage even greater than that arising from mere natural coldness and stolidity. An earnestness which to the audi-

ence appears unsuited to the theme, and for which there is yet no adequate occasion, repels and estranges them, either by exciting a suspicion of its insincerity, or by rebuking them for their own want of feeling. No auditor will weep solely because the orator is in tears, but when the emotions of the orator are aroused in due and just proportion to the ideas he enunciates, and correspond exactly with their own, his sensitive and earnest disposition bestows on him a power over his audience against which they are seldom able to contend.

§ 44. Qualifications of the Orator : Common Sense.

Another qualification of the orator, and not less essential, is common sense, or that natural sagacity by which he intuitively discerns what the occasion and the temper of his audience demand. This is the faculty by which he practically applies his knowledge of human nature. In the variety of his audiences and subjects, in the constantly shifting attitude of every audience toward the matter in discussion, he must be able instantly to recognize what thought or word is fittest for his purpose. No previous preparation can confer this power upon him. The state of mind and heart to which he must adapt his utterances is of his own creation, and must be realized and responded to by him at once before it passes by. He must perceive clearly when to speak and when to preserve silence, which of his premeditated arguments to offer, which to suppress and which to modify, what arguments of his adversary to refute and what to leave unnoticed, what ideas to urge to the full measure of their energy, what to employ in part and leave their natural effect upon the mind to be evolved by the reflection of the hearer. Without this quality all the foregoing qualities are vain. It avails little with the auditor that the orator is a good man, that he understands human nature, that he is in earnest, if in his actual speaking he disregards all the requirements of propriety, and, by suppressing what he ought to say and saying

what had better be suppressed, he arouses prejudice, solidifies antagonism, and eventually destroys his cause. This quality, like the last, is the gift of nature. Some men are endowed with such an exquisite sense of the fitness of things that they never speak an inappropriate word, nor perform an action at an improper place or time. Others exhibit characteristics wholly different, always involving themselves or their associates by some act or word which, if not objectionable in itself, becomes so by its entire inconsistency with existing circumstances. Self-cultivation can, however, do much to correct this faulty disposition. It generally results from habits of carelessness and haste. A man who understands what the occasion actually requires, and exercises due control over his words and conduct, never unwittingly outrages propriety. A thorough knowledge of human nature, combined with a full acquaintance with his subject, will teach the orator what he ought to say, and watchfulness over himself will keep him from the utterance of what is injurious or unnecessary. By careful discipline in this direction, he may develop in himself such a degree of sagacity and self-control as, except in extraordinary instances, will prevent him from falling into fatal error.

§ 45. Qualifications of the Orator: Logical Skill.

The possession of logical skill and acumen is another requisite in oratory. Although the orator rarely employs philosophical methods of demonstration, or frames his arguments in syllogistic form, yet, as whatever arguments he uses are reducible to syllogisms, they are subject to the same fallacies which attend all other modes of reasoning. To construct an enthymeme, adduce examples, select and cite authorities, in such a manner that they will be impregnable against the assaults of his adversary, while at the same time they convince the hearer, is his constant duty; and to present these arguments on the spur of the moment, and

without premeditation, demands the highest dialectic skill. Only an orator whose intellect is well trained in logical methods, and with every faculty alert, can avoid the dangers which at such times await him. The reasoning powers have another task to perform, and one almost equally severe, in analyzing and refuting the arguments of the adversary. To bring such arguments to the test as they successively fall upon the ear, to discern wherein their strength or fallacy consists, to devise methods of evading them when sound and of exposing and destroying them when weak, requires the nicest logical perceptions and the utmost fertility of invention and resource. Such dialectic skill is the result of long and constant practice. It is not enough to have the rules of logic graven on the memory, or to understand the mode in which a perfect syllogism should be framed. The mind of the orator must have become so accustomed to move according to these rules, that it instinctively detects a fallacy in the reasoning of others, and as instinctively avoids it in his own. The skill which may suffice for the polemic in his closet, or for the philosopher in his academy, will not suffice for one whose weapon is the spoken word. Dialectic science makes no demand on any man to be compared with that which it makes upon the orator, and no man more devoted than he is to its cultivation ought ever to be found.

§ 46. Qualifications of the Orator : Universal Information.

The orator needs also an almost universal knowledge. To whatever form of oratory he devotes himself, the questions which he discusses relate to every department of human learning, and on every question his information ought to be as far as possible complete. By undertaking to convince and to persuade, he assumes to himself a better acquaintance with his subject than his auditors possess, and he can justify this assumption to their minds only as they perceive that he is able to resolve every perplexity and doubt that may sug-

gest itself to them. If it were true, as has been said, that "any man can speak well upon a matter which he fully understands," it is true also that no man can speak well upon a matter of which he is ignorant. But his knowledge is not to be limited to the mere question which constitutes the theme of his discourse. His examples and authorities, his illustrations and his figures, demand a range of information which is simply without boundary, embracing all the ages of biography and history, all the stores of wisdom that are crystallized in proverb or in song, all the phenomena of earth and sea and air. Whatever may define, whatever may enforce, whatever may adorn, is his; and nothing, human or divine, that he can know must be rejected as beyond his needs. Not all the knowledge which the orator requires can be obtained, however, in the seclusion of his study, or by contemplating the phenomena of consciousness. Of the special subject which he treats he must inform himself by every proper means, according to its nature. But for the knowledge which he fashions into arguments and illustrations he must look among the men who are to be his auditors. If they are learned in ancient story, if they have pierced the mysteries of science, or are familiar with the images and incidents of poetry and romance, out of these treasures of truth and beauty he may gather the examples and authorities and figures which he employs. But to an audience of plain, practical men, for whom the world is their own field and fireside, and history is the current record of to-day, such arguments and illustrations would be useless. To them the orator must speak of other and more homely things, drawing his images from what they see and hear, evoking the great thoughts which actuate their lives, and leading them by examples taken from the persons or events which are within their observation and experience. Hence the orator must not only know what may be known on every matter within the scope of human understanding, but he must know the

same thing in many aspects and in many different relations. Nay, more, he must not only know it in its true and perfect character, but also in those false conceptions of it which so often prevail among the unlearned and the prejudiced, in order that, whether he is speaking to the wise or to the foolish, he may employ the fact according to their idea and interpretation.

§ 47. Qualifications of the Orator: Pleasing Manner.

Another attribute of the orator is a pleasing manner. The first impression which he makes upon his hearers is by his personal appearance and behavior. Before he fairly looks them in the face, before the first sound issues from his lips, they have received some impulse for him or against him from his countenance and attitude alone. During his whole oration these impressions are repeated, and, apart from every idea that he presents and from every argument that he employs, there is an influence which flows from him to them, and often exercises more control over their action than either his reasonings or his exhortations. It is not true, perhaps, that "the manner is the orator," but it is true that one whose disagreeable aspect or demeanor constantly forces itself upon the notice of his audience can never lead them to forget themselves and him, and to become absorbed in and devoted to the measures that he urges. This pleasing manner is not, however, dependent upon physical symmetry or beauty. It has not been the lot of the world's greatest orators to vie with Apollo in majesty of form, or with Adonis in perfection of feature. Doubtless some strange deformity, too horrible or too ridiculous to escape attention, would be fatal to his power. But when the homely, rugged face is illuminated with the fire of genius, or the diminutive and puny body throbs with noble and resistless impulses, there are few eyes so critical as to perceive the ugliness of one, or hearts so cold as to despise the weakness of the other.

§ 48. Qualifications of the Orator : A Manner Indicative of a Good Character.

The manner of the orator can favorably influence his audience only when it expresses the sentiments of an upright and generous heart. To be good in himself that he may realize and feel what he imparts to others, to be regarded by his hearers as an example of that which he desires them to become, and to exhibit this interior character in his exterior conduct toward them, is to be truly eloquent, to win their confidence, to please. The manner of the orator is thus the continuous representation to his auditors of the sentiments with which he wishes to inspire them, and as such it must be thoroughly consistent with the high and solemn obligations which he is attempting to discharge. To discuss questions of duty, happiness, or virtue with a trifling, careless air, to mingle sallies of paltry wit with exhortations to excellence and self-denial, to manifest in the countenance or in the intonations of the voice those evil passions which the noble impulses of human nature constantly condemn, unceasingly reminds the auditors that the orator is insincere, and ought not to be trusted as their guide. The idea in the mind, the impulse in the heart, the expression in the manner of the orator,— all these must correspond, or he can never exercise that moral force upon his hearers which is the solitary test of oratory.

§ 49. Qualifications of the Orator : A Modest Manner.

The manner of the orator should likewise express the modesty and self-distrust with which he undertakes his arduous labor. Nothing so much offends the auditor, or so quickly puts him on his guard and arrays him against the orator, as arrogance. The orator who boldly offers battle as if the first blast upon his clarion were to witness the surrender of his hearers, throws away his chance of victory before he

strikes a blow. No auditor can be driven to a conclusion, nor will he tolerate for an instant an evident attempt to override his will. The moment he discovers such an effort he ceases to be a friend, or even an inquirer, and becomes the pitiless critic, whom no argument will convince and no solicitation will persuade. But the orator who appears to be without self-consciousness, to be regardless of a personal triumph and anxious only for the triumph of his cause, who feels and shows that he feels the magnitude of his responsibilities and his own inability to discharge them, elicits at once the sympathy of his audience; they become interested for his success, and welcome every opportunity to agree with his conclusions and reflect his impulses.

§ 50. Qualifications of the Orator: A Manner Friendly to his Hearers.

The manner of the orator should also express his interest in his audience. As he does not occupy toward them the relation of a commander who coldly orders, or of a guide who mechanically directs their march, but rather of a comrade endeavoring to make certain the correctness of their common path and their arrival at the common goal, his behavior toward them should be that of a solicitous and helpful friend. Without familiarity, without presumption, but with all dignified and gentle earnestness, he bears himself toward them, with eye and voice as well as language perpetually reminding them of the united hopes they cherish, and of the common good that they desire. An audience thus treated shortly forget that the real aim of the orator is to draw them over to him, not to surrender himself up to them. His utterances seem to them rather the echo than the suggestion of their own thoughts, and his final appeal appears to be the expression of their determination rather than its cause.

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§ 51. Qualifications of the Orator: Cultivation of Manners Implies Cultivation of Character.

The cultivation of these oratorical manners is the cultivation of the traits of character which they express. The most consummate hypocrite cannot always clothe himself in the appearances of probity, humility, and benevolence; and the orator who should attempt to discipline his outward demeanor into conformity with these well known rules, leaving his inner nature vicious, proud, and malevolent, would surely drop his mask at some important moment, and ruin both himself and his cause. To have the manners of an upright, modest, kindly man, the orator must be what these express, and being such, and crushing out that demon of self-consciousness which makes even a good man "fool and fumble like a knave," he will appear to those who hear him to be worthy of their fellowship and trust.

§ 52. Qualifications of the Orator: Skill in the Art of Speaking.

Finally, the orator must be a man skilled in the art of speaking. The art of speaking is not a system of morals or manners only. It embraces all those rules which govern the production and communication of ideas, the logical arrangement and demonstration of truths, the use of language, the construction of sentences, the employment of gesture; in fine, the doing of that act which goodness, knowledge, earnestness, and pleasing manners qualify the orator to do. How great a part this skill in speaking plays in practical oratory may be determined from the fact that it is to this almost exclusively that all the treatises on oratory have been especially devoted. The orator attains his end by such a presentation of ideas to the minds of his auditors that the ideas are clearly comprehended, that they operate with energy upon the intellect, that they arouse their corresponding impulses, and that those impulses become strong

enough to dominate the will. The art of oratory is the art of presenting ideas in such a manner as to secure this series of results. Skill in this art is, therefore, that which alone distinguishes the orator from other men. To innumerable others may the first half of the epithet of Cato, "Vir bonus," be applied; but only of the well trained orator can the latter, "dicendi peritus," be truthfully affirmed. The cultivation of this art, and its complete appropriation to himself, is the characteristic duty of the orator. Its precepts, formulated in a past which was venerable when Demosthenes was young, confirmed by ages of experience, and illustrated by the orations which still echo from the Bema and the Forum, claim from the orator of to-day the same assiduity and minuteness of devotion which they received from the pupils of Quintilian. By mastering these precepts, by constant discipline and practice in his art, by studying good examples, by ever striving after a more perfect knowledge and a higher skill, he adds to all his natural and acquired abilities this last, this characteristic, this essential attribute, and becomes "a good man skilled in speaking."

CHAPTER VI.

OF FORENSIC ORATORY.

§ 53. Forensic Oratory the Judicial Form of Political Oratory.

Forensic oratory is the judicial form of political oratory. It addresses the disposition toward duty. It recognizes that its auditors are naturally inclined to fulfil their legal obligations. It assumes that whenever the contemplated act is identified in their minds with these legal obligations they will inevitably tend to its performance. Its object, therefore, is to establish this identity, and to stimulate and strengthen the resulting impulse until it finds expression in the act proposed.

§ 54. Forensic Oratory Seeks to Obtain the Favorable Decision of a Legal Controversy.

The act whose performance an advocate endeavors to secure is the favorable decision of his cause. To render this decision it is necessary that his auditors should fully comprehend the questions which the cause presents, that they should perceive the desired decision to be demanded by the rules of law, and that their natural disposition to comply with this demand should conquer opposing influences, and control their will. The orator must, therefore, create within their minds an accurate idea of every point in controversy, convince them that the law requires a judgment upon each point in his favor, and urge this conviction on them with such energy as to arouse their impulses toward duty, and irresistibly impel them to perform it.

§ 55. Circumstances Conducing to the Success of Forensic Oratory.

In one portion of his labors the circumstances of his auditors afford the advocate much effective aid. Judges and jurymen, when honest and intelligent, invariably approach a cause with a strong sense of duty and a firm determination to fulfil it. All their surroundings remind them of the magnitude of their responsibilities. The formalities by which they are selected from the body of the people, their temporary separation from the outside world by barriers invisible as well as visible, the presence of the contending parties with their witnesses and counsel, the order and solemnity of the proceedings,—all these concur to arouse their sensibilities, and to impress them with the dignity of their position and the importance of the interests committed to their charge. For the time being, the whole current of their lives thus flows in the direction which the orator desires, predisposing them to obey the impulses which he addresses, and rendering them submissive to the influence of his appeal.

§ 56. Circumstances Hindering the Success of Forensic Oratory.

Other circumstances in the condition of the auditors are hostile to their perfect comprehension of the nature of the cause and of the judgment which the law demands. The confusion which results from the successive presentation to their minds of many different causes, the weariness engendered by continuous compulsory attention, the mental perturbation excited by the publicity and prominence of their position, the consciousness of their own ignorance of the merits of the controversy and of their dependence upon others for whatever light may guide them in deciding it, conspire to embarrass and defeat their efforts to ascertain the matter in dispute, and to determine what their duty in regard

to it requires. Hence, while it has never happened that an honest judge or jury has decided contrary to the known justice of a cause, it has by no means been uncommon that, from their failure to perceive its real merits and to discover on which side truth and right resided, they have determined contrary to actual justice, and have unwittingly become the instruments of wrong.

57. Art of Forensic Oratory Consists of Three Processes: Statement, Argument, Appeal.

Forensic oratory consists of three processes, — Statement, Argument, and Appeal. The statement defines the issues which are to be submitted to the judgment of the hearers. The argument demonstrates their legal duty in respect to each one of these issues. The appeal urges and directs them toward the decision which the advocate wishes to secure. The statement and the argument occupy toward each other the relation which definition and demonstration occupy in every form of oratory. The matter and the manner of the whole oration, but especially of its commencement and its close, constitute the appeal.

§ 58. The Statement: its Purpose.

To create within the minds of his auditors an accurate idea of every matter in dispute, and of his claims in reference thereto, as well as of the facts and law on which those claims are based, is the first duty of the advocate. That formal definition of the issues which is presented by the pleadings is usually too terse and technical to convey a clear conception of the actual controversy, even to the legal mind. The orator must, therefore, amplify it by a statement in which, with equal precision, but with far greater completeness and simplicity, he explains every question which his hearers are expected to decide, and indicates the judgment which he wishes them to render.

§ 59. The Statement: its Importance.

The importance of this statement it is impossible to overrate. From it the hearers gain their first impressions of the matters in dispute, and of the claims of the advocate concerning them; impressions which no subsequent arguments or evidence are able wholly to efface, and which color and interpret every thought or proposition that is afterward presented to them. A clear, concise, and reasonable statement not only informs the auditor, it pleases and sometimes convinces him, while a confused, prolix or improbable statement disappoints, disgusts, and generally repels him. To the performance of this duty, therefore, the skilful and experienced advocate always devotes especial care, well knowing that a faulty statement renders a convincing argument impossible.

**§ 60. The Argument: Relates to Matters of Fact or
Matters of Law, or Both.**

Every issue in a cause presents two questions, either or both of which may be disputed: (1) What were the facts in which the controversy has originated? (2) What are the rules of law by which, in view of those facts, the issue is to be determined? The answer of the orator to so much of these questions as is not answered by the admissions of the parties, by conclusive proof, or by supreme exterior authority, constitutes the argument.

**§ 61. The Argument: Mode of Demonstrating Matters
of Fact.**

That portion of the argument by which the existence of a certain state of facts is demonstrated consists of inferences from facts within the general knowledge of the hearers, or from established facts peculiar to the cause. Those universal truths which all men recognize; that vast fund of practical information which is the common property of mankind; the current experience and belief of the community; the special

matters with which his audience may be familiar ; the known character and history of the parties ; the demeanor, interest, and apparent credibility of witnesses ; matters attested by documentary or uncontradicted evidence ; — all furnish arguments by which the truth or falsehood of any allegation of fact may be established. These arguments address themselves to ideas already operating in the mind of the hearer, and present the disputed proposition to these ideas as to a test or touchstone by which the truth may be detected and declared. In our modern practice the attempt to prove disputed facts by means of witnesses occupies so large a portion of the time devoted to the trial of a cause, and the jury are so constantly enjoined to decide the issues according to the evidence presented to them, that a detailed examination of the testimony appears to be the principal, if not the only, method of arriving at the truth. The advocate must not be misled by this appearance. To reconcile conflicting statements, to compare opposing witnesses with one another and determine their respective credibility, to sift the grain of truth out of the chaff of immaterial and inconsistent evidence, is a task which no ordinary jury, even with the aid of the best advocacy, is able to perform. Except in issues where the evidence on one side overwhelms and sweeps away the evidence upon the other, — issues in which, therefore, there is little room for doubt, — the decision of the jury is almost always based upon some general principle which in their view includes and governs the disputed point, or on some salient fact by which the issue is distinctly brought into relation with their preconceived ideas. The value of any fact as a ground of argument is, therefore, in proportion to its harmony with these general principles and previous ideas. Circumstantial evidence derives its weight from the connection which it establishes between the fact in issue and the universal truths already known. Hence, while it is often necessary that conflicting testimony should be introduced,

and utilized in the argument as far as seems expedient, the advocate who, in his zeal to vindicate his witnesses, loses sight of the great facts and principles by which the jury are certain to be guided in their estimation of the evidence and their judgment of the cause, neglects the strongest, and the only sure, means of establishing the truth of his positions.

§ 62. The Argument: Mode of Demonstrating Matters of Law.

The arguments by which legal rules are demonstrated and applied are drawn from the existing knowledge of the hearers, and from the recognized repositories of the law. Many of the great principles of law require no proof. Embalmed in venerable and familiar maxims, they are deposited in the memories of all men, and there subsist as universal and impregnable ideas. Others, less important and familiar, are proved by the production of authorities, or are stated by the advocate subject to confirmation or correction by the court. Like other universal ideas, the former exercise over the auditors a controlling influence. These principles themselves, and the conclusions which are drawn from them, furnish the strongest and the simplest arguments. The advocate who employs himself with these escapes from the confusion which a conflict of authorities occasions, and the dismay which the correction of his doctrines by the court involves. So far as he identifies the rules which he endeavors to enforce with the great maxims of the law, so far does he address ideas which are already governing his hearers, and necessitate their favorable judgment.

§ 63. The Appeal: its Purpose and Scope.

The methods by which the advocate causes the ideas, which are developed by his statement and his argument, to operate with controlling energy upon the minds of his hearers differ in no substantial feature from those which characterize

every act of oratory. He undertakes to move his auditors from a condition of indifference or hostility to one of interest and effective favor. In order to accomplish this, he must approach them, identify himself with them, and accompany them to the conclusion which he desires. He must carry his statement and his argument into the boundaries of their intellectual domain, and adapt his thoughts, his language, and his manner to their own. Starting from their accustomed ideas, at the point where he has brought the ideas of his cause into relation with them, he must proceed from step to step, as each new vantage ground is gained, without deviation or cessation, until he brings them to the act of judgment. And all the while he must not for an instant relax his hold upon their hearts and minds, but keep them firmly in his grasp by uttering his ideas in the most attractive language, and pressing them home by striking illustrations and conspicuous examples.

§ 64. **The Appeal: Difficulties to be Encountered.**

In some respects this portion of his labors presents peculiar difficulties to the advocate. In sacred oratory, and even in the other forms of political oratory, there is a natural relationship and sympathy between the audience and the orator. The subject of discourse has some degree of personal interest for both, and often their religious or political proclivities render the establishment of a community of thought and feeling easy and secure. No such advantages attend the forensic orator. The cause at bar is one in which his auditors have no concern, in which his own interest is transient and accidental, and which ordinarily has no such connection with the social or political condition of either of them as to find a common ground for its promotion in their common welfare. The advocate and his hearers are also generally at the antipodes of human occupations and ideas. The educated lawyer, delving among his books, feeding his mind on

abstract principles, and habitually steeling his heart against those sympathies and aspirations which almost all other men permit to rule their lives, has little real fraternity with the sturdy yeoman who lives from his heart outwards, and occupies his thoughts and hands with the hard, tangible realities of active life. The training of the advocate leads him away from, not toward, his ordinary hearer, and therefore, when they look each other in the face across the narrow limits of the cause, there is between them an abyss far wider than any other orator is called to span. The task to be performed, however, is the same. The advocate must cross this abyss ; he must get to his hearers, no matter how far he goes out of himself ; and, with whatever violence to his own tastes and wishes, he must remain with them until his prize is won. In this self-abandonment, in this identification of himself with them, there is no paltry artifice, no ignoble descent, nothing unworthy of himself or them. The law which makes them judges of his cause imposes upon him the duty of presenting it to them in a manner suited to their comprehension, and he serves justice best who brings them with the utmost certainty to swift and righteous judgment.

§ 65. *The Appeal: its Oratorical Limitations.*

The law of constant progress toward his desired end compels the forensic orator to avoid many of those diversions which, in other forms of oratory, are sometimes permissible. For him there is no pleasant description, no amusing anecdote, even no strife of wit unless it bears directly on the subject of discussion and stimulates the ideas of his hearers on the points involved. While nothing useful is to be discarded, nothing useless is to be intruded, but with his own gaze riveted on the ideas embodied in the decision which he wishes to obtain, he presses on, with constantly increasing energy, toward the end desired. Here is the secret of the wonderful success which has attended the brief orations of

the great advocates. While others have been led by their erroneous ideas of oratory to occupy their moments in instructing or in pleasing as well as in convincing and persuading men, these orators have set aside all purposes save the supreme purpose of controlling the will of their audience, and, by a few rapid passages of tremendous force and clearness, have defined, convinced, and persuaded in the fraction of an hour.

§ 66. **The Appeal : its Rhetorical Limitations.**

The means by which the advocate enchains the attention of his hearers, and suits his language to their varying thoughts, consists in the employment of the same rhetorical figures which are required in other forms of oratory. Yet even here the forensic orator is restricted more than any other. The central idea he presents is duty. The impulses which attend this idea, as he represents it, are necessarily few, and are by no means the strongest and most absorbing of those which grow out of the natural dispositions of the heart. His whole oration gathers thence a character of moderation and sobriety, not necessarily attendant on any other form of oratory, except in those rare cases where the issues of his cause are calculated to excite intense emotions. Hence in his choice of epithets and metaphors, as well as in his manner and delivery, dignity and earnestness appear rather than vehement and enthusiastic fervor. A plain and simple mode of illustration, a chaste and sober ornament, a self-contained and courteous deportment, are all that is appropriate to the great majority of the causes that he seeks to gain. The jury are not won by noise and bluster ; they do not sit to weep over the common ills of life, especially when suffered by such persons as do not hesitate to expose them to the public eye. They sit to judge ; and, conscious of their duty, they will most readily follow him who gives to them the clearest ideas, the best arguments, and the strongest reason to rely upon his word.

CHAPTER VII.

OF PRACTICAL ORATORY.

§ 67. Practical Oratory : Invention.

Every oration consists of one or more ideas, conceived in the mind of the orator, and by him arranged, expressed in language, and orally delivered to his hearers. The act of the orator in conceiving those ideas of which his oration is to be composed is called Invention. It may consist in the production of ideas never before conceived by any one, or in the collection and adoption of ideas already conceived and expressed by others. In either case the act is appropriately named, since, though the thought is old, its application to the present subject is a true invention.

§ 68. Practical Oratory : Expression.

The ideas thus collected are also to be suitably expressed. The idea actually conveyed to the mind of the hearer is the idea that he attaches to the words and phrases which the orator employs. Not only, therefore, must the language of the orator accurately represent his own idea, but it must be adapted to the immediate and unerring comprehension of his auditors. A single word which fails in either of these requisites confuses and disturbs the intellectual operations of the hearer, and dims the clearness of the conceptions which he already entertains. Language, however, serves not merely to convey ideas, but also to intensify and to adorn them. The same idea which, when expressed in certain words, falls unavailingly upon the ear, if clothed in other language strikes the mind with overwhelming power. The proper choice of

words, and their correct construction into sentences and periods, thus becomes a matter of the highest import to the orator. By means of these he can extenuate opposing ideas and destroy their practical antagonism, and at the same time so intensify his own that they will operate with all the energy which the character of the ideas themselves permits.

§ 69. Practical Oratory: Arrangement.

The clearness with which any idea is conceived, and the energy with which it operates in the production of an impulse, depend to some extent on its relation to other ideas which are concurrently imparted to the mind. With reference to every individual there is a certain sequence in which a series of ideas must be presented in order that each idea may exert upon him its maximum of force, and in every oration that arrangement of ideas which will produce the strongest impression on the average auditor is the one which the orator must discover and adopt. The movement of the human mind toward any action is, in its great outlines, usually the same. Indifference or hostility yield to favor, favor to conviction, conviction to persuasion, persuasion to determination. In their great outlines, also, all orations are alike. They first conciliate, then convince, and then persuade. But in directing any individual mind along this pathway there are many minor details to be considered and arranged; and hence, subordinate to this great outline, there is another, which changes in each oration as the subject or the auditor or the circumstances may demand. The orator must have regard for both of these, and so associate his ideas that not only will each exercise its greatest force, but that the series, as a whole, will produce the most profound impression on his audience.

§ 70. Practical Oratory: Delivery.

The oral communication to the hearers of the ideas thus expressed has justly been regarded as the most important

part of oratory. On it the auditor depends entirely for his perception of the ideas which the orator endeavors to convey, and from it those ideas mainly derive the energy with which they operate upon his mind. No force in the ideas themselves, no beauty and aptitude of language, can ever compensate for want of excellence in this respect. The masters of the art have placed it so far above all others that they have been regarded as esteeming it to be the only necessary and characteristic element of oratory. Demosthenes, when asked what he regarded as the chief excellence of oratory, gave to delivery the first, the second, and the third place, as though he looked upon it as alone essential. Cicero says: "Delivery has the sole and supreme power in oratory; without it, a speaker of the highest intellect can be held in no esteem; with it, one of moderate abilities may surpass those who otherwise possess the loftiest genius." Certain it is that no auditory can endure with patience, or regard with favor, an orator whose utterance is unintelligible, or whose action is uncouth, and that, on the other hand, the shallowest ideas are often eagerly received when communicated with a distinct and musical voice and a pleasing and appropriate gesticulation.

§ 71. Practical Oratory: its Divisions.

In the preparation and delivery of an oration the orator thus employs four different processes: Invention, Expression, Arrangement, Delivery. Invention is concerned with the collection and preparation of ideas; Expression, with the selection of language communicating these ideas, and its construction into sentences and periods; Arrangement, with the order of their presentation; Delivery, with the use of voice and gesture in impressing them upon the audience. To the consideration of each of these processes, in its application to Forensic Oratory, the Second Part of this work is devoted.

PART II. OF THE PRACTICE OF FORENSIC ORATORY.

BOOK I.

OF INVENTION.

§ 72. Invention Defined.

Invention is the act by which an orator produces in his own mind the ideas which are to be employed in his oration. These ideas must, in the first place, be connected with the contemplated act. As every voluntary action is the result of certain impulses which are themselves engendered by ideas, it is evident that no ideas can generate an impulse toward that action unless they are in some degree related to it. The number and character of available ideas are thus determined by the nature of the contemplated act. These may be few or numerous, weak or powerful. If few or weak, it is a misfortune which cannot be avoided or remedied by the employment of ideas foreign to the act. If numerous and powerful, all may be included, or the orator may select from them such as the exigencies of the case require.

§ 73. Invention: Ideas must Arouse an Impulse toward the Proposed Act.

In the second place, the ideas employed in an oration must engender or stimulate an impulse toward the contemplated act. Other ideas, although perhaps related to the act, so far from promoting the purpose of the orator,

tend rather to its hindrance and defeat. They divert the attention of the auditor from the object on which all his thoughts should be concentrated. They interrupt that constant movement of his mind by which alone conviction and persuasion are attained. And hence, except in cases where the intensity of the emotions generated by appropriate ideas demands relief in order that reason and judgment may regain control, ideas which do not excite an impulse toward the act should never be employed.

§ 74. Invention: Ideas must be Suited to the Hearers and the Occasion.

In the third place, the ideas employed in an oration must be suited to the hearer and to the occasion. The power of an idea to arouse its corresponding impulse depends largely on the susceptibility of the person to whom it is addressed, and on the conditions under which it is presented. The value of an idea to the orator cannot be measured by its intrinsic force, nor by the strength of the impression which it makes on his own mind. The previous ideas and dispositions of the auditor, as well as the circumstances which surround him, may augment or diminish its effect upon him, and therefore in the light of these concurrent influences must the actual service it will render be examined and estimated.

§ 75. Invention: its Integral Parts.

The act of invention thus consists: (1) In determining the nature of the contemplated act, the character and number of the impulses which prompt it, and the ideas by which in the proposed actors these impulses may be excited; (2) In ascertaining the sources from which these ideas are to be derived; and (3) In collecting and classifying these ideas preparatory to their arrangement and expression.

CHAPTER I.

OF THE IDEAS SERVICEABLE IN FORENSIC ORATORY.

§ 76. The Proposed Act in Forensic Oratory always Includes the Idea of a Duty to be Performed.

The contemplated act, in forensic oratory, is the favorable decision of a cause. The proposed actors are the judge or jury, upon whom rests the legal obligation of rendering a decision in accordance with the established facts and with the rules of law. The province of the advocate is to identify in their minds the desired decision with that required by law, and induce them to perform their duty by giving a judgment in his favor. In every cause there is, therefore, at least one impulse which urges the actors toward the contemplated act, — the impulse to fulfil their legal obligation. This impulse necessarily arises in their hearts whenever the idea of legal duty is developed in their minds. The advocate develops this idea by demonstrating that his claims as to the facts are true, and that his conclusions as to the law are correct.

§ 77. In Forensic Oratory the Idea of Duty is always Derived from the Issues in the Cause.

If it were possible in any cause that both the facts and the law should be uncontested, this idea of legal obligation would present itself at once to the attention of the jury or the judge. The oration of the advocate would then consist of a statement of the nature of the cause, an explanation of the judgment which the law required, and an appeal to the inherent sense of duty. But as, in practice, every cause is contested either as to facts or law, and as on the decision of these subordinate controversies depends the final judgment of the cause itself, the idea of duty must be developed out of

the ideas involved in these controversies by processes of demonstration. Hence, the first duty of the advocate, in seeking for material for his oration, is to ascertain and thoroughly examine these subordinate controversies.

§ 78. Every Cause Presents one or more Primary Issues.

Every cause, civil or criminal, consists of one or more propositions, either of fact or law, affirmed on one side and denied upon the other. If but a single proposition is affirmed, the issue is a simple **one**, and the denial is as comprehensive as the **affirmation**. Where two or more propositions are affirmed, the denial may extend to all, resulting in a complex issue, or it may be confined to one, and constitute a simple issue. In trespass *quare clausum*, for example, the plaintiff must affirm possession in himself, and an unlawful entry by the defendant. The defendant may deny the entry or the possession, thus tendering a single issue, or by a general denial he may raise a complex issue, and put the plaintiff upon proof of both. Again, in burglary the commonwealth affirms that the defendant broke and entered, in the night season, with felonious intent, into the dwelling of another. A general denial creates a complex issue, including seven ingrediental issues, on each of which the commonwealth must establish its position beyond reasonable doubt. Or the defendant may in fact, if not in form, rest his defence upon a single issue of the seven, and, successfully maintaining this, attain the same result as if the seven had been decided in his favor.

§ 79. A Primary Issue may Present Several Subordinate Issues, on any One of which the Decision of the Cause may Turn.

Each of these primary issues may in its turn contain other issues, either simple or complex, whose determination is essential to the decision of the issue which includes them;

and under these still lesser issues may be found, until the whole cause may be made to rest upon some single indissoluble fact, or on some simple dictum of the law. This single fact or dictum then becomes the actual issue in the cause, the only matter in dispute, the final test of legal obligation. Thus, in the charge of burglary, the defendant may deny the breaking, on the ground that the door by which he entered was ajar, and on this fact alone the question of his guilt or innocence depends. Or in a trespass, if the defendant justifies his entry for that he was an officer duly serving civil process, and this be met with an allegation that his entry was upon the Sabbath before the setting of the sun, the entire cause may be reduced to the question as to the moment when defendant entered on the plaintiff's land.

§ 80. Ultimate and Decisive Issues to be Ascertained and Presented for Decision.

Whenever the issue can be thus simplified and concentrated in one single proposition, the labor both of the advocate and of his auditors is rendered short and easy. Confusion and obscurity, as far as is ever possible, are thereby excluded. The relevancy of the proof is clearly seen and the idea of legal obligation is easily developed and applied. Justice as well as the true interest of both parties, therefore, requires that the cause should be presented to its arbiters with issues as few and as well defined as the nature of the controversy will permit.

§ 81. To Discover the Ultimate Issue is the Advocate's First Duty.

The discovery of this last, decisive issue is the first duty of the advocate. This constitutes the cause. This is the only proper subject-matter of the oration. The ideas which lead his hearers to decide it in his favor are all with which he need concern himself. If he can induce them to agree with him on this, his cause is won ; if not, his cause is lost.

§ 82. Difficulties in Discovering the Ultimate Issue Great but not Insuperable.

The difficulties in the way of this discovery, though great, are not insuperable. They exist not so much in the cause itself as in the obstacles which hinder the advocate from examining and understanding it, and these by time, tact, and patience can almost always be removed. The advocate who begins his labors by a candid and exhaustive investigation of his case, with the sole purpose of ascertaining its exact merits, and not with the design of finding some method of winning it, right or wrong, will generally arrive sooner or later at a clear view of the points upon which its decision must eventually turn.

§ 83. Difficulty of Discovering the Ultimate Issue Greater for the Affirmative than for the Negative.

The difficulties which the affirmative encounters in discovering the issue are much more formidable than those presented to the negative. When the affirmative consists of several propositions the affirmant cannot know, however accurately he may conjecture, whether a single one or all will be disputed, and hence he must investigate the answers or evasions that are possible to each, and determine which are likely to be urged. The denier, on the other hand, in whom resides the option to contradict one point or many, can easily and immediately decide what facts or legal rules shall constitute the issue. His first examination of his case is really but an inquiry whether such an issue can be found and successfully maintained.

§ 84. In Civil Cases Pleadings are Designed to Present the Ultimate Issue,

In civil cases the pleadings are designed to lead the advocate directly to this issue. Under the ancient rules, they must have terminated in the affirmation and denial of a

single fact or legal proposition, and the issue was thus always indicated, if not explicitly defined; and though under our modern systems of procedure the practice is less strict, and complex issues may more frequently arise, yet where their rules are intelligently followed, each separate issue is usually determined with sufficient exactness to enable the careful advocate to ascertain the point on which the controversy turns.

§ 85. In Criminal Causes the Pleadings Rarely Present the Ultimate Issue.

In criminal causes, on the contrary, except in some peculiar issues, such as *autrefois convict*, etc., the pleadings afford the prosecutor very little aid. An answer of not guilty puts the commonwealth on proof of every material allegation contained in the indictment, and gives no indication whether the prisoner will deny all these allegations, or base his defence on some subordinate fact which is included in a single one. While, therefore, in such cases the defendant can forecast the issue with entire certainty, the prosecutor must ascertain, as best he may from his investigation of the evidence at his command, where the real stress of the conflict is to come.

§ 86. Having Discovered the Ultimate Issue the Advocate must next Search for Arguments to Support his Claims in Regard to its Decision.

The issue having been discerned, the attention of the advocate is next directed toward the arguments by which the duty of the hearers to decide it in his favor can be demonstrated. If the issue is one of fact, and the disputed fact can be substantiated by the direct evidence of witnesses, the argument sustaining it will be of the simplest character, and will consist in the application of the evidence to its proper subject, and in demonstrating the knowledge and integrity of those from whom the evidence proceeds. When direct evidence

of the fact is wanting, the arguments by which it is supported will consist of inferences from other facts, either established by the evidence, or conceded by the parties, or known alike to advocate and hearers. The direct testimony of a witness that he himself has paid a promissory note, or seen it paid, requires no further comment from the advocate than such as may be necessary to connect it with the note in question, and to satisfy the hearers that the witness is reliable. The same result is reached, but by an entirely different method, when payment is inferred from the discovery of the cancelled note in the possession of the maker, from the admissions of the payee to third parties, or from the lapse of time. In issues of law, the argument consists in applying to the subject legal rules that are well known or are undisputed or are stated by authority, or in deducing from such rules the particular propositions governing the cause at bar and making application of them to the facts. An instance of the former is where a prosecutor proves that the matters alleged in the indictment constitute a crime, by comparing them with the definition given by the statute or the common law; an instance of the latter, where from the constitutional power of Congress to regulate commerce the advocate contends for its control over the navigable waters of the several States.

§ 87. Arguments Useful only when Communicable to the Hearers.

In order that an argument may influence the hearers, it is essential that they should fully apprehend the ideas of which it is composed. It is impossible to reason from indefinite premises to definite conclusions, or to be convinced by demonstrations whose constituent elements are unintelligible. Whenever, therefore, the ideas from which an argument might be constructed are not already present in the minds of the hearers, and cannot be communicated to them in pursuance of the rules of evidence, the argument itself must be

abandoned. A fact which cannot be proved does not exist for forensic purposes, unless it belongs to that great body of facts with which all men are supposed to be familiar. A proposition has no force as law unless prescribed by competent authority, or logically deducible from that which is prescribed. Thus, though the advocate may find many ideas within his case by which light might be thrown upon the issue, he can only employ those which already have been, or upon the trial can be, brought to the knowledge of the jury or the court.

§ 88. The Issues in a Cause Present other Ideas besides that of Duty.

In addition to this idea of duty, other ideas are, in most cases, capable of rendering service to the advocate. Very few are the transactions between men which are so bald of every feature except that of legal obligation as to confine an orator to this alone. And in the causes actually presented to our courts, the lights and shadows of human life are always sufficiently reflected to suggest many thoughts and excite many emotions besides the simple one of duty. The suit of a poor laborer for wages justly earned and unjustly withheld, of any person for the redress of injuries arising out of wantonness or negligence, the prosecution or defence of any criminal, presents ideas engendering admiration for the honest and industrious, pity for the oppressed or injured, anger and indignation against the unjust and perverse. Even an issue of pure law often embraces questions of public policy, or personal liberty, or domestic happiness, by which the deepest feelings of the heart are stirred.

§ 89. All Ideas to be Subordinated to the Idea of Duty.

These additional ideas are, however, only properly employed in aid of the great central one of legal duty. It is no part of the purpose of a court of law to do general justice

to the plaintiff or defendant ; its only object is to administer a specific remedy for a specific wrong. Whatever be the character or conduct of either party, he is entitled to a judgment when his claims as to the issue are correct. An insolent and oppressive creditor, no less than one who is forbearing and considerate, has a right to the payment of his lawful debt. A powerful and wealthy corporation, when defendant in a suit, is entitled to the same decision as if it were a meritorious and struggling partnership. The obligation of the judge and jury is determined by the law applied to the established facts, and any departure from this obligation is a perversion of justice. While, therefore, it is proper, and often highly advantageous to the advocate, to excite various emotions in their hearts by which they may be more powerfully impelled to discharge this obligation, it is a prostitution both of his powers and theirs to arouse these impulses in order to mislead them, or to induce them to neglect their duty. The advocate who without bias and with thoroughness investigates his cause, and discovers reasonable grounds for believing that his client is in the right, may in its advancement honestly and honorably employ all his abilities of conviction and persuasion ; but every dictate of reason and conscience forbids him to promote or countenance unjust and groundless litigation, or to endeavor to seduce courts and juries from their duty, whatever sacrifice of fame and fortune his refusal so to do seems likely to involve.

§ 90. Subordinate Ideas to be Confined to the Issue.

The ideas by which these additional impulses are aroused must also be connected with the issue. The one supreme thought of the entire oration is that the duty of the hearers demands a judgment for the advocate upon the points in controversy. Any idea which distracts their attention from this thought, which interrupts their progress toward conviction and persuasion as to these disputed points, although the

emotions it excites are favorable to his client, is really an injury to his cause. The advocate must, therefore, find all these ideas among the facts and principles which constitute or are connected with the issue, and, doing this, his presentation of them for collateral purposes aids and intensifies their operation on the point of duty.

§ 91. Subordinate Ideas must be Acceptable to the Hearers.

Finally, the advocate cannot be too often reminded or too constantly remember that no ideas on any point avail him, if they are unappreciated by or are unwelcome to his hearers. To convince them and arouse them, he must be comprehended by them, and must please them. And in all his search for and selection of ideas he must ever have in view the individuals whom he seeks to influence, and above all else endeavor to secure material which shall produce the desired effect upon them.

CHAPTER II.

OF THE SOURCES OF IDEAS.

**§ 92. Ideas Available to the Advocate are of Two Classes :
Ideas Derived from Matters Outside the Cause.**

The ideas available to the orator are of two classes : (1) Those which are derived from matters outside the cause, and are already present in the minds of his hearers as well as of himself ; and (2) Those which are involved in the cause, and can in some legal manner be communicated to them by him. So far as they are applicable to his case, ideas of both these classes are of use to him, and in collecting his materials both should be always carefully explored. The sources from which ideas of the first class may be gathered are almost innumerable. The impressions made upon the minds of men by tradition, reading, observation, and experience relate to every object in the universe. Nothing that can be known is so mean or so exalted that it may not suggest ideas by which an argument can be illustrated, or emphasized, or confirmed. The properties of matter, the phenomena of nature, the character and habits of the animal creation, the examples of history and biography, the brilliant fantasies of poetry and romance, the crude and solid wisdom of proverbs and maxims, the facts of science, the devices of mechanics, the mysterious processes of the arts, in fine, everything that eye has ever seen, or ear heard, or pen or voice communicated, may furnish thoughts more forcible than even the sworn evidence of witnesses for the conviction and persuasion of his hearers. One limit only can be placed, and that the ever memorable one, that all the matters from which ideas of this class can be drawn, for the contemplation of his hearers, must be as fully in their knowledge as his own.

§ 93. Ideas Derived from Matters within the Cause Relate to the Persons or Things Involved, or to the Law.

The ideas of the second class relate to matters included in the cause itself. Ideas extrinsic to the cause cannot be communicated to his hearers by the advocate. If known to them already, as part of that general information of which all partake, he may employ them as he will. But the ideas, which they are permitted to derive from him, are those alone which are relevant or material to the issue, and may be legally presented to them by evidence or by authority. These matters thus included in the cause may all be grouped in three divisions: (1) The persons in the cause; (2) The things in the cause; (3) The law of the cause. Each of these presents to the advocate a field for special and exhaustive investigation.

§ 94. Ideas Concerning the Persons in the Cause.

The persons in the cause are the plaintiff and defendant, the witnesses, the judge and jury, and all others who in any manner actively contribute to create or decide the controversy. Every cause, civil or criminal, originates in some alleged act or default, and wherever the commission of this act or default by him to whom it is imputed is denied, valuable if not conclusive inferences upon this issue may be derived from his personal character and situation. When the evidence of witnesses is introduced, an inquiry concerning the witnesses themselves often discloses whether or not reliance can be placed upon their testimony. Careful investigation of the history and predisposition of the judges or the jury may indicate the probable effect upon them of particular arguments, and the decision at which they are likely to arrive. And even as to those whose connection with the cause is collateral and remote, it is frequently profitable to inquire whether their natural qualities and circumstances render it probable that the acts attributed to them were really performed.

§ 95. Ideas Concerning the Persons in the Cause: their Character and Circumstances.

The matters concerning the persons in the cause include: (1) Their characters and circumstances; (2) Their racial and political relations; (3) Their social relations; (4) Their interest in the cause; (5) Their actual connection with the cause. A knowledge of the personal character and circumstances of any individual is always of great value in determining a question as to his past or future conduct. The age, sex, occupation, wealth or poverty, bodily strength and constitution, mental and moral habits, education, opportunities, associates,—all these, and many other facts which enter into the personality and situation of every human being, form a basis for strong arguments in reference to guilt or innocence, justice or partiality, veracity or falsehood. Every voluntary act or omission is in some degree the result of a long series of causes, among which all these various particulars may be embraced, and an examination of those causes will generally lead to a correct conclusion in regard to the acts or the defaults of the individual under any given circumstances. That a young woman of wealth, of sound mental and moral training, and without evil associations, should rob, or steal, or perjure herself, is almost incredible. That a man of low birth, of vicious surroundings, of ill-developed moral nature, without work and without money, should testify falsely or commit a crime is highly probable. And upon any issue whether a certain person did or will do some specific act, the readiest and most convincing proof, apart from direct evidence, is drawn from these particulars in the character and situation of the individual himself. In this field of inquiry are also found innumerable tests by which the truth or falsehood of other matters may be demonstrated. No matter what fact may be in dispute, if it involves an action or a neglect to act, light may be thrown upon it from some one of these characteristics

and circumstances. The execution of an instrument may be defeated or established by the production of the handwriting of the alleged grantor. A claim for money loaned may be denied by showing that at the time the pretended lender was himself in need. Theft of a heavy package by the prisoner may be successfully disproved by making manifest his physical inability to take and carry it away. It is in this field that the human mind naturally and instinctively seeks for the solution of every question as to the authorship of certain acts, and often rests its faith more firmly on the inferences which it draws from them than on the positive evidence of others. This fact indicates its value to the advocate, not only for the number of the ideas with which it may supply him, but for the weight with which every argument composed of those ideas will naturally impress itself on the conviction of his hearers.

§ 96. Ideas Concerning the Persons in the Cause: their Racial and Political Relations.

The racial and political relations of an individual also afford many indications as to his probable conduct, whether as a party, a witness, or a judge. Every race of men has its peculiar modes of thought, its moral standards, by which it measures and determines the phenomena of social life. The differences between them in these days of intimate commercial intercourse are not as striking as of old, but yet with few exceptions the individuals of these races are in many respects wholly different men, and in their conduct under given conditions will differ very widely from each other. Every student of social science soon discovers that among the different nations of the earth the widest diversity of opinion prevails concerning the sanctity of domestic life, the value and inalienability of human liberty, the right of personal redress for real or fancied wrongs, the duty of the individual to his fellow citizens or to the state. In our great American cities, where

men of all races congregate together, these differences are so well understood that from the nature of an act alone the skilled investigator often immediately conjectures the nationality of him by whom it was committed. The difference between the credibility of witnesses of the more and less imaginative races, at first perhaps a prejudice, has also by experience been developed into a fixed opinion. Differences as clearly marked, though not so numerous and great, often prevail between men of the same race but of different political affiliations. The settled political opinions of a man are the fruitage of his reason, observation, and experience ; and by them, as manifested in his party adhesions, he may usually be fairly judged. This is especially true in our own country, where the discipline of school gives place with a brief interval to the discipline of party, and the education which began with the alphabet and primer is continued by the newspaper and rostrum. Political theories and relations thus established inevitably influence, and sometimes control, the views of individuals in reference to questions outside the domain of politics ; and hence on any proposition involving, however indirectly, partisan ideas or interests, it is not difficult to see that their conclusions will harmonize with these ideas, and so to forecast their decision. A jury equally divided between the two great parties, if they divide equally upon the issue, will generally be found with the six men of one party on one side, and the six men of the other party on the other. The famous eight to seven of the Electoral Commission contains a profound lesson to those who are accustomed to read the remote causes of human actions in the acts themselves, and illustrates that fundamental social law, which in his actual experience in lesser instances the advocate every day discovers to be true, that voluntary human action is the net result of immediate incentive and long indulged predisposition.

§ 97. Ideas Concerning the Persons in the Cause: their Social Relations.

The social relations of an individual also have considerable value as indicative of the motives toward certain lines of conduct. Each of the different classes of society has its own prejudices and predilections, its own standard of good and evil, its own ideas of the true method of meeting and of solving the great problems of human life. Men in the lower strata of society have little temptation to make a show or to keep up appearances. Their actions usually have reference to physical and present benefits, and as between these and a future abstract good they will almost invariably endeavor to acquire the former. For the same reason, they impose far less restraint on their emotions, and do not hesitate to manifest in words and actions the passions and desires that burn within. Men in the higher walks of life are actuated by entirely different motives. Their physical necessities are well supplied, desire for show or wealth or power or pleasure becomes naturally their ruling passion, and their acts are prompted by an impulse to secure the object of desire. The social discipline to which they are subjected compels them to control the exterior manifestation of their feelings, to mask the deadliest hate in smiles, to restrain the stroke of anger or revenge or jealousy, however strong the passion which impels it. The reality and effect of these distinctions find indisputable evidence in criminal statistics. Assaults, affrays, robberies, burglaries, thefts, bigamy, manslaughter, and other similar crimes, are crimes of the lower and less cultured ranks of men; while forgery, embezzlement, and fraud in all its forms, prevail more generally among the higher. Social distinctions also create prejudices which demand attention whenever future conduct is to be conjectured. It is almost uniformly true that men, whose associations are confined to their own social rank, are strongly prejudiced against those whose station is superior or inferior to theirs. The laborer

often regards the capitalist with antipathy, and the capitalist not infrequently looks down upon the laborer with contempt. When one of these classes, as in our system of government often happens, sits in judgment on the other, these prejudices generally exercise more or less influence on the judicial mind, and sometimes lead it far astray. The heavy verdicts, which the sturdy yeomanry have sometimes rendered against corporations, are only an expression of the same antagonism which a jury of the corporators would exhibit toward a beggar charged with vagrancy.

§ 98. Ideas Concerning the Persons in the Cause: their Personal Interest in the Cause itself.

The interest which an individual may have in the result of certain actions of course would not be overlooked in examining into his connection with those acts themselves. Every man is governed by his interests, and whatever it is for his interest to do he naturally will do if he is able. Therefore whenever a voluntary act has been done, and its authorship is disputed, the presumption is almost conclusive that it was done, or was procured to be done, by him whose interest it was to have it done. The same rule is applied to future conduct, and men continually act on the assumption that others will consult their interest, and be guided by it in whatever they undertake to do. In investigating this matter the advocate must carefully avoid an error which frequently occurs in estimating the interest of a person in the cause. The interest which any individual has in any action, and by which he is governed, is that which seems to him to be his interest. The views which different men take of the same action or conditions are widely different. One is eager for riches and indifferent to pleasure. One hungers after knowledge; another thirsts for power. An act, which procured an empire for Diogenes, would have served his interest as little as an act which procured a tub would have served the inter-

ests of Alexander. In estimating interests, therefore, it is first necessary to determine from the personal history, the circumstances, and the relations of an individual what in his view his true interests are, and not till this is ascertained attempt to judge how far the acts in question would have hindered or promoted them. A neglect of the former of these lines of inquiry has led to serious but needless mistakes in many important causes.

§ 99. Ideas Concerning the Persons in the Cause: their Connection with the Cause.

The inquiry as to the connection of an individual with the cause is the most fertile, because the most particular, of all these personal investigations. It involves the consideration of all the details of the act on which the cause is founded. It embraces an examination of his ability and opportunity to perform the act, of his preparations for its commission or concealment, of the instruments which he employed, of the various stages of the act itself, of its immediate and remote results to him, of his conduct subsequently to the act, and of the legal and moral effect upon him of the act when so performed. Here nothing is unimportant. Masses of fact are valueless, detail is everything; and the most zealous and exhaustive elaboration of each particular cannot throw too much light on the connection of the alleged actor with the act. This is strictly the field of the *res gestæ*, the facts involved in the issue. All other facts are worthless except as they may aid in ascertaining this, and are investigated only that the information thus obtained may render the truth or falsehood of the claims concerning this one more apparent.

§ 100. Ideas Concerning the Persons in the Cause always Numerous and Important.

It is evident that the ideas which may be collected by a diligent inquiry as to these five classes of facts relating to the

persons in the cause must be very numerous, and furnish a large amount of the material of which a forensic oration is composed. It is among these ideas that whatever may appeal to the sympathy, the indignation, or the favor of the hearers will be found, and from them the most striking if not the most conclusive arguments may be constructed, and the most interesting and exciting narratives be drawn. However great the thoroughness with which the advocate pursues this investigation, it will rarely fail to meet with an adequate reward.

§ 101. Ideas Concerning the Things in the Cause.

The things in a cause are all those objects which, in any other manner than as intelligent and voluntary actors, are connected with the cause. Among them are inanimate objects, the brute creation, human beings considered as the end and not the source of activity, and acts or defaults when distinguished from the persons by whom they are committed. In every cause there are necessarily more or less of these. Every civil suit involves some action or omission, and is intended to redress a wrong directed against either property or individuals. Every criminal prosecution is instituted for the punishment of acts from which some object has sustained an injury, and usually embraces matters that relate to other objects also, either as the instruments or fruits of crime. The collection of ideas concerning them, therefore, becomes the constant duty of the advocate, and affords him valuable and inexhaustible material for argument and illustration.

§ 102. Ideas Concerning the Things in the Cause are of Ten Classes.

Ten attributes or categories have been, for many ages, regarded as predicable of every intelligible object, and whether philosophically correct or not still serve as a con-

venient classification of all that can be known concerning it : (1) Existence ; (2) Quality ; (3) Quantity ; (4) Relation ; (5) Place ; (6) Time ; (7) Action ; (8) Passion ; (9) Posture ; (10) Habiliment. These indicate the different lines of inquiry which it is the duty of the advocate to pursue.

§ 103. Ideas Concerning the Things in a Cause : Existence.

The inquiry as to the existence or non-existence of a thing is of course a fundamental one. If the thing be the action or omission from which the cause originated, or be the person or the property for whose injury redress is sought, an answer in the negative is the determination of the controversy. Even although the thing investigated is subordinate to the main object in dispute, the fact of its existence may nevertheless constitute the real issue, and if successfully established or denied may control the ultimate decision of the cause. It is in reference to this attribute of objects that questions concerning variance between proof and allegation generally occur. The thing which is material to the cause is the thing as described in the pleadings, not as it is in itself. In every case of misdescription, therefore, the thing described does not exist, however real may be the object which the pleader intended to delineate. Variance between the statement of a contract and the actual agreement is equivalent to the non-existence of the contract as alleged ; and the same is true of every allegation as to acts or objects which the pleader has erroneously made. The inquiry concerning the existence of anything which is described is thus a comparison between the description and the fact, and if substantial variance is found, the thing itself, so far as this cause is concerned, does not exist. Subordinate acts or objects not being described, or whose description is superfluous or immaterial, must be investigated as they really are,— the simple fact of their existence or non-existence alone being important.

§ 104. Ideas Concerning the Things in the Cause : Quality.

The attribute of quality embraces all those characteristics of an object which distinguish it from other objects of the same species ; such as the color, habits, temper, speed, and health of animals, the shape, sharpness, and deadly character of weapons, the contents of written instruments, the properties of drugs, the model, rig, and seaworthiness of vessels, the features, gait, and other physical peculiarities of individuals, or the severity and quickness of a blow. All estimates of value or of damage done, all inquiries as to the possibility of producing a result by certain means, all inferences concerning the intention of the actor from the instruments employed in the performance of his act, all questions as to the identity of persons, animals, or property, and other controversies of the same general character, are settled by determining the qualities of things.

§ 105. Ideas Concerning the Things in the Cause : Quantity.

The attribute of quantity relates to number, weight, volume, and intensity. The first three of these are predicate of every tangible object ; only number, of actions or omissions ; only intensity, of light, heat, or electricity. As a field of inquiry, this attribute is chiefly valuable when the object is considered in relation to the other objects or the persons in the cause, and then becomes a fruitful source of arguments. The degree of light, for instance, at a given time and place, may determine whether evidence concerning acts or objects, said to be then and there observed, should be regarded as reliable. The size of a weapon as compared with that of a wound, the weight of a parcel as compared with the strength of a person accused of having carried it away, the number of coins as indicating the value of the amount tendered or received, are other examples of the influence exerted by this attribute in the solution of questions arising in a cause.

§ 106. Ideas Concerning the Things in the Cause: Relation.

The relation of one thing to another, either as its cause or its effect, or as modifying its action, or as indicating what it was or is to be, is perhaps the most important and suggestive of these attributes. There is no act or object which is not related in some degree to something else, and which cannot be better understood by examining it in its relation with connected objects. The more intimate and necessary the relation, the more conclusive is the inference which it affords. The suspicion of suicide, which arises when a dead man is discovered with a discharged pistol in his hand, becomes a strong opinion when a bullet of the same calibre is found within his brain, and ripens into full conviction if the wadding, taken from the wound, proves to be a portion of a letter in his own writing, the rest of which is found upon his person. In a certain manner, the study of this attribute includes that of all the others, since each of the things related must be thoroughly examined before the significance of their relation can be fully understood. When the relation is itself a controverted fact, the character and number of its attributes are like those predicated of all other objects.

§ 107. Ideas Concerning the Things in the Cause: Place.

The attribute of place refers to the location of the act or object during its connection with the cause. It is distinguishable both from posture and relation. Posture is predicable of an object, in whatever place the object may be situated. Place, when considered as an element of relation, must be predicated of at least two objects, both of which are known. But as an independent attribute it can be affirmed of any single object, and from it inferences may be drawn concerning other objects and relations. Thus does the fact that goods are stolen from some secret place indicate that the thief had knowledge of the spot in which they were concealed. The discovery of instruments of homicide in a

locked trunk points to the holder of the key as having guilty knowledge of the crime. The existence of an apparent landmark in the line of an asserted boundary confirms the assertion of the claimant, and may demonstrate his title to the land. Like all the following attributes, it is perhaps but one form of relation, yet if so it is sufficiently important to be considered as a separate matter of investigation. As the most simple, the most readily examined, and affording the most plain and potent arguments, it is perhaps of all relations the most valuable to the advocate.

§ 108. Ideas Concerning the Things in the Cause: Time.

Time embraces the ideas of date, succession, and duration. The precise moment when an act was done, the order in which events succeeded one another, the duration of occurrences or objects, constantly become important in estimating their results as well as their relations, in tracing effects to causes, and in reproducing the true characters and qualities of things. An *alibi* is a defence grounded on the two attributes of place and time, as predicated of the accused. The order, in which a mortgage and release were executed and delivered, determines their relation to each other. The duration of a product manifests the presence or the absence of the qualities which the manufacturer contracted that it should possess. In reference to this attribute, as well as that of quantity, it should be remembered that the difficulty of establishing it with exact precision seriously impairs its value in forensic oratory.

§ 109. Ideas Concerning the Things in the Cause: Action.

The attribute of action relates to spontaneous but non-intelligent motion and causation, and to the results thereby produced, whether upon the other objects in the cause or on the minds of its intelligent and voluntary actors. The conduct of the irrational animals, the movements of the ele-

ments and their effects upon animate and inanimate objects, the phenomena of attraction and repulsion, the operation of machinery, the excitation of human avarice or lust or anger by the presentation of the objects which engender such emotions, are instances of action. One form of this attribute, causation, closely resembles one form of relation, cause and effect. It differs from it however in this, that in causation not the fact that the effect follows from the cause is subject to investigation, but the mode only by which the admitted result is accomplished. When the thing in the cause is itself an act, this attribute relates not to its existence, its qualities, or its consequences, but solely to its *modus operandi*, — the manner in which, being what it was, it produced the effects in which it has resulted. Thus, when the action was a blow and the effect was death, the act, its violence, and its result may be admitted; the question still remains as to the mode in which it operated to destroy the victim, and on this question life and death may hang.

§ 110. Ideas Concerning the Things in the Cause: Passion.

Passion is an attribute relating to subjection and to receptivity. It embraces all the changes, limitations, and extensions wrought in an object or an action by the acts of persons, or by the influence of things. The damaged herbage in an entered field, the wounds on a dead body, the blood-stains on a garment, the signature and attestation on a deed, the detection or prevention of a crime, are common illustrations of the facts and conditions which this attribute includes. Wherever the relation of cause and effect exists between two objects, the action predicated of the one produces the passion predicated of the other. One of the most conclusive inferences is that which from two of these elements derives the third. The passion of the object acted on and its relation to the acting subject being known, the action of the latter is immediately understood; or, given the relation and the

cause, and the effect upon the object is at once discernible. The most successful and important investigations, both of the detective and of the advocate, relate to facts in which these three attributes, action, passion, and relation, are in this way involved.

§ 111. Ideas Concerning the Things in the Cause: Posture.

Posture is the position of an object considered in itself, and without reference to surrounding objects. Thus, a person or an animal may sit, or lie, or stand erect; a knife may be closed or open, a coat be folded or loosely cast upon the ground. Whatever be the posture of an object, it is either the effect of a cause extrinsic to itself, or results from the volition of the object. In the first case, like any other effect, it indicates the character and action of the producing cause; in the last, the intention or expectation of the person who assumes it. The posture of the object also seriously affects the operation of the cause, and renders it essential to the understanding of the latter that the former should be fully understood. In every case of injury to person or to property this attribute of the thing injured demands attention, and often serves to indicate the nature and the source of the injurious act.

**§ 112. Ideas Concerning the Things in the Cause: Habili-
ment.**

The attribute of habiliment relates to covering, vesture, or possession. This attribute so far partakes of the nature of the individual or object of which it is predicated, that what is true of one is almost certain to be true also of the other. The envelope of a letter, the scabbard of a sword, the clothing of a person, are identified with that which they enclose in time, place, action, passion, and position. The indications they afford concerning the attributes of the object to which they belong are, therefore, invaluable. The shoes of a suspected burglar, foul with the clay that surrounds the entered

dwelling, betray his presence at the scene of crime. The garments of the dead, rent and torn by weapons, reveal the means by which life was destroyed. The wrappings of a lost package, found in the possession of a carrier, point to the means by which it disappeared. In questions as to the identity of persons, this attribute is also of the highest moment ; conclusions being drawn almost entirely from the observation of the person when fully clothed, and the similarity or dissimilarity of vesture contributing to the conviction or denial of identity.

§ 113. Ideas Concerning the Persons and Things in the Cause are of Infinite Variety and Great Importance.

In reference to all these different attributes there is room for almost infinite investigation. They meet and interlace with one another in every direction. The discovery of one leads by inference to the establishment of another, and this one to a third, each step confirming and extending the discoveries already made, until from the most trivial beginnings the great conclusive facts stand out in full development. In the perception and pursuit of these details lies the supreme excellence of the detective's art, who, consciously or unconsciously reducing his investigations to a system based on these attributes of things, feels his way gradually, with unerring skill, from the faint shadows of suspicion to the full light of indisputable proof. This art the advocate should also strive to master. The ability to ascertain what may be known, and to combine and correlate the facts thus ascertained in such a manner as to indicate still further facts, is so essential that no wise lawyer will neglect its cultivation. From want of it, or of its exercise, come most of the disappointments which the advocate experiences in his professional career. When in the full tide of assured success the astute adversary suggests some little fact by which the current of the proof is turned against him, or when after the cause is lost he wonders

at the dulness or the negligence which overlooked the point on which his client's hopes and fortunes have been wrecked, he realizes that no effort is too great and no search too exhaustive if it be necessary to discover all the facts relating to his cause. And with the line of inquiry so clearly indicated, nothing but the entire absence of the means of knowledge can excuse him, if his investigation leave behind it any source for such surprises when the conflict actually comes.

§ 114. Ideas Concerning the Law of the Cause: Classes of: Rules of Evidence.

The law of a cause embraces: (1) Those rules of law which govern the admissibility and production of evidence concerning facts; (2) Those rules which govern the construction of such facts, and their application to the points in issue; (3) Those rules which govern the decision of the cause itself. Those rules which govern the production and admissibility of evidence are involved in every cause in which an issue of fact is presented. Whatever of importance the advocate may discover, in his investigations as to things and persons, is available to him only when it can be legally established. It is a necessary though sometimes an inconvenient maxim of the law, that in a court of justice only that is true which can be proved; and to the test afforded by this rule every fact existing in the cause must at some stage of the proceedings be subjected. Immediately upon his answering to himself the question, What are the facts? arises therefore to him this one equally momentous, Can they be proved?

§ 115. Ideas Concerning the Law of the Cause: Rules Governing the Admissibility of Evidence.

The evidence by which facts that are provable can be established is frequently of different kinds, between which the law rigidly distinguishes, requiring that which it regards as the best evidence to be alone adduced. The contents of

a written instrument, for instance, may be proved by the production of the instrument itself, by a sworn copy, or by the oral testimony of witnesses who have examined and remember it. Each of these kinds of proof seems satisfactory in itself to ordinary men, but the law will permit only the first where the instrument itself can be obtained, and the last only when the first and second are shown to be impossible. Hence, when the provability of any fact becomes apparent to the advocate, he has still further to determine by what evidence at his command the rules of law compel him to support it.

§ 116. Ideas Concerning the Law of the Cause: Rules Governing the Production of Evidence.

The method and the order in which admissible evidence must be introduced are also regulated by the law. With the rules governing these matters every advocate must be presumed to be familiar. Yet no degree of confidence in his familiarity with them ought ever to prevent him from determining, at this stage of his labors, the mode in which he will present his proof, and answer the objections that may be suggested. Postponement of this inquiry until the cause is actually on trial often results in sad surprises, which might easily have been avoided. If he remembers that his fact cannot be treated as an element in the cause until it is legally before the jury, it will be clear to him that his examination of the fact is not complete unless he ascertains not only that it exists, and that it can be proved, but the exact method by which, in spite of all objections and all contingencies, he will ultimately establish it.

§ 117. Ideas Concerning the Law of the Cause: Rules Governing Presumptions of Law and Fact.

The rules which govern the construction of the facts, and their application to the points in issue, also concern every

cause in which an issue as to fact is raised. While every fact is in itself just what the evidence discloses it to be, many facts have in law a peculiar character not contradictory to, but in excess of, that which they naturally possess. The doctrine of presumptions, which enters so largely into the law of evidence, thus gives to certain facts a most important technical construction, which constitutes the real nature of the fact itself as contemplated by the courts. The retention by the vendor of the possession of goods sold is a striking example of the effect of these presumptions. In certain jurisdictions this fact is regarded as conclusive evidence of a secret trust in favor of the vendor, and as against his creditors renders the sale *ipso facto* void. In other jurisdictions the same fact is considered *prima facie* evidence of secret trust, but may be rebutted or explained by other testimony. The proof of such retention, therefore, does not merely show the physical location of the goods described; it demonstrates that the vendor and the vendee have secretly conspired against the creditors of the vendor to perpetrate a fraud, or at least puts them upon proof that such conspiracy does not exist. The doctrine that a written instrument is subject to construction by the court, and that its meaning is not simply what its language might imply but what the law considers it to mean, is still another instance of this rule that every fact, for all forensic purposes, is the fact as it exists in the contemplation of the law.

§ 118. Ideas Concerning the Law of the Cause: Rules Governing the Application of the Facts Proved to the Points in Issue.

The application of the facts proved to the points in issue is matter for still further inquiry. The law does not permit a jury to decide an issue, even according to their own convictions, unless the evidence is legally sufficient to warrant their decision. Hence, the advocate must not only have at

his command such evidence as is required to prove the facts he wishes to present, but he must present facts which, if established, will justify the judgment that he seeks. Where direct testimony to the sole fact in issue in the cause is to be offered, this question is identical with that of the provability of the fact desired. But when the fact in issue is to be deduced from other facts, the same point is always indirectly raised, and is another form of the inquiry whether from the established facts the fact in issue can properly be inferred. This is a question which the law never allows a jury to decide contrary to the settled principles of human reasoning. The interference of the court does not, in such cases, indicate a simple difference of opinion between it and the jury as to the existence of a state of facts ; it is the inevitable and necessary supervision which the law exercises over the unskilled ratiocinations of the men who are its instruments, and constitutes the safeguard and the check which alone render jury trials possible. Its true nature is shown by the distinction that, if the fact decided was evidenced by direct testimony only, the court will never interfere except in cases of such manifest error as to raise a suspicion of corruption ; while if the fact decided was a fact to be deduced from other facts, any important error in the inference involves the effective interposition of the bench. In estimating the value of his facts the advocate must, therefore, have a constant reference to the rules by which their sufficiency for his purpose is determined, and if they appear clearly insufficient they should be unhesitatingly rejected.

§ 119. Ideas Concerning the Law of the Cause: Rules Governing the Decision of the Cause itself.

The rules of law which govern the decision of the cause itself complete the field of inquiry presented to the advocate. When the entire cause is reduced to a single issue, these rules are the same as those in reference to the legal suffi-

ciency of the facts to support a verdict; for in such causes, if the facts are legally sufficient, a verdict in accordance with such facts must follow. But where, as in most cases, subordinate issues are created, and on sufficient facts have been determined, the question still remains whether, upon the whole cause, the plaintiff or defendant shall have judgment. The rules by which this question is to be decided are, therefore, to be fully ascertained before the advocate can adequately measure the merits of his cause, or rest assured that he has mastered the ideas which it presents for his consideration. The point at which the investigation of the advocate is thus completed is the same point at which it was begun. In his determination of the issue the first step was to ascertain these rules, and by their aid discover what must be affirmed in order to sustain the cause, and what denials are sufficient to defeat it. Thence he proceeds to the special points of which the affirmation was composed, and to the facts by which these points might be maintained. Now he applies to all his labor this supreme and final test, and by the result judges of the future of his cause.

CHAPTER III.

OF THE COLLECTION OF IDEAS CONCERNING MATTERS OF FACT.

§ 120. Collection of Ideas concerning Matters Outside the Cause.

Ideas concerning facts universally known are constantly, and without conscious effort upon his part, entering into and extending the mental resources of the advocate. His general reading, his professional experience, his social intercourse, his daily contact with the world, furnish him with this material, which may be indefinitely increased in measure and importance if he persistently familiarizes himself with human actions and affairs.

§ 121. Collection of Ideas concerning Matters Within the Cause: Difficulties Encountered.

Ideas concerning the facts peculiar to the cause, however, are usually to be obtained only by positive and earnest inquiry. The facts themselves, except in very rare instances, are originally unknown to him. The lapse of time since their occurrence often destroys all physical traces of events, and so far changes the character of objects that their examination gives him no certain knowledge. The failure of witnesses to observe and recollect particulars, the loss of evidence through carelessness or accident, and many other even greater difficulties, must be surmounted, or the evils they entail must be endured. But the result which follows careful, persevering inquiry, in spite of all these obstacles, often surpasses the most sanguine expectations of the advocate.

§ 122. Ideas concerning Matters within the Cause Collected by Direct Investigation or by Inference: Field of Direct Investigation.

Ideas concerning facts may be collected either by direct investigation of the facts themselves, or by inferring them from other facts already known. Both of these methods are open to the advocate, and are of service to him in almost every cause. The direct investigation of the facts themselves is pursued by the examination (1) of his client; (2) of other witnesses; (3) of objects and places; (4) of the results of experiment; (5) of private writings; (6) of public records.

§ 123. Direct Investigation: Examination of the Client: its Difficulties.

The first information which the advocate obtains is generally derived from the statements of his client, and in securing information from this source he should be especially upon his guard. Things are to a man what he conceives them to be, and with his personal interest in the cause, and perhaps his passions also, coloring all his views and estimates of things, it is natural that every favorable circumstance should be exaggerated, and every hostile one extenuated or concealed. A client almost always at first considers his counsel less as an adviser than as a judge. He seeks to vindicate himself, to justify his actions or his claims, and to secure an opinion which confirms his own. Under such conditions it is no easy matter to elicit from him the exact truth and the whole truth, even in regard to facts which he actually knows; while all the difficulties which grow out of carelessness of observation or defect of memory are to be met in him as well as in less interested witnesses.

§ 124. Direct Investigation: Examination of the Client: his General Statement.

The advocate should see his client personally and alone, and without questioning or interruption permit him to relate his story in his own way, no matter what irrelevant statements he may make, or how far back in the order of events he may incline to go. At this stage of the investigation the advocate knows simply nothing of the case, and should neither direct the attention of his client to specific points, nor confine him to particular details. The attempt to do this generally results in hopelessly confusing him, or in excluding from the advocate the knowledge of material and important facts. On the contrary, he should with patience watch and listen, studying both the client and the cause, endeavoring to detect the interests and the passions which are likely to pervert his judgment or veracity, as well as to discern the great outlines of the controversy, and the facts by which his side of it may be maintained.

§ 125. Direct Investigation: Examination of the Client: Questions of the Advocate.

This operation finished, the advocate should next inquire concerning everything which seems to him connected with the cause, whether or not it is important in the estimation of his client, pursuing his investigations as to things and persons in the manner which their several attributes require. Having exhausted this examination, the client should be directed to restate, from the beginning, all the details of his cause. His memory, being now refreshed by the questions of the advocate, will probably recall some matters heretofore omitted, or in relating the same facts the coloring which he first gave them will be reduced or disappear, and the real merits of his case be thus disclosed.

§ 126. Direct Investigation : Examination of the Client : Cross Questions of the Advocate.

The narration of his client being at an end, the advocate assumes the character of an opponent, and considers what contrary assertions he is likely to encounter, and to what cross-examination the client, if a witness, will be subjected. These contrary assertions should be then propounded to the client, and his answers to them scrutinized with care. As to all doubtful or unreliable portions of his story he should be also rigorously and fully cross-examined. This mode of treatment, though apparently severe and involving time and patience, is eminently useful. No tenderness for human feelings could excuse the surgeon who would shrink from any necessary examination of a wounded limb, and the true interests of a client no less require a thorough probing of the weaknesses and demerits of his cause.

§ 127. Direct Investigation : Examination of the Client : Result Reduced to Writing.

The ultimate results of all these statements should be written down, and read over to the client, and when correct be signed by him, and be kept by the advocate not only as a guide to further inquiries, but as a method of refreshing the recollection of the client, if in regard to any matter it should fail, and of justifying his own action in pursuance of such information, if at any future time it should be called in question.

§ 128. Direct Investigation : Examination of Alleged Witnesses.

It often happens that the facts narrated by the client indicate that further facts, unknown to or merely conjectured by him, are within the knowledge of other individuals from whom the information concerning them can be obtained. These individuals, whether competent as witnesses in court or not,

the advocate must personally examine, following substantially the method previously adopted with his client and constantly remembering that, although without interest in the cause itself, the natural desire to please will lead them to color favorably the facts which they narrate and possibly to make assertions which have no foundation. These statements should be written down, signed by the persons making them, and carefully preserved for the same purposes as that made by the client, and also lest on account of some change in their feelings toward the client their testimony, unless thus secured, might be withheld.

§ 129. Direct Investigation: Examination of Objects and Places.

Whenever any tangible object is involved in any issue, either as a direct subject of controversy, or as the instrument or the result of any action, this object should be critically examined by the advocate himself, no matter how complete and accurate the description of it by his client or his witnesses may appear to be. The same course should be pursued in reference to places where, or concerning which, an action is alleged to have been performed. Ideas conveyed to him by others on these matters are never so exact and perfect as those obtained from ocular observation, and for his own information, as well as to enable him properly to conduct the examination of his witnesses in court, he should always personally inspect them.

§ 130. Direct Investigation: Examination of the Results of Experiment.

In many cases, where the cause of visible or provable effects is in dispute, experiments with the supposed cause may be necessary to determine whether by its means the known effect could be produced. Thus, for example, a bullet passing through a window-pane penetrates the victim's

skull and is discovered in her brain, weighing a few grains less than one exactly fitted to the bore of the defendant's gun. Experiment alone can tell whether the loss of metal from the ball, by contact with the glass and bone, could be so slight that it might have been fired from the weapon claimed. Or, again, a man whose name appears as grantor in a deed denies the signature. Experiment will indicate whether the writing so resembles his as to make its genuineness probable. All such experiments, though sometimes properly performed by experts only, should be, if possible, conducted in the presence of the advocate, — the clearest of descriptions not being even here equivalent to sight.

§ 131. Direct Investigation: Examination of Private Writings.

When any part of a transaction has been reduced to writing, or any memorandum or description of an event or object has been made, the advocate should obtain and carefully examine it. This is a field of inquiry which becomes daily more fruitful of results as the practice of making and preserving written memoranda becomes more common among men, and in its exploration deserves far more attention than it usually receives. The statement of a client or his witnesses concerning the importance or the contents of such writings should never be implicitly believed. The advocate should insist on the production of all letters, books, and papers in which an entry in any way relating to the cause could possibly be made; and when produced, they should be thoroughly examined. By doing this he often will prevent the disagreeable discovery, after his case is lost, that in some neglected corner of his client's cupboard lay an old book or letter, containing entries or admissions that might have won the cause.

§ 132. Direct Investigation: Examination of Public Records.

This personal investigation of the advocate should extend also to whatever public records may throw light upon the cause. Perfect confidence cannot be placed in the correctness of any copy, by whomsoever made. The original files and dockets of the courts, the records of the probate, land, and tax offices, the registers of births, marriages, and deaths, — themselves too often not conspicuously legible, — are far less likely to mislead the advocate to whom the object of the search is fully known, than the mere copyist whose eye and hand alone are occupied in their transcription; and therefore, when they are accessible to him, should be submitted to his personal inspection. In this pursuit not much dependence must be placed upon the indexes to public records. Omissions and mistakes in these occur too frequently to render the results of an examination, conducted by their aid alone, entirely reliable. There are few lawyers of an indefatigable temper who have not succeeded in some investigation of this kind, after another of inferior pertinacity has tried in vain. The advocate who takes nothing for granted, not even the accuracy of other men's sensations, and insists on testing all things for himself, will find his time and patience most severely tried, but will often be rewarded by success where lesser efforts must have surely failed.

§ 133. Direct Investigation: Not Confined to One Side of the Cause.

In making these direct investigations the advocate should not confine himself to persons and objects from which he may have reason to expect evidence or arguments in support of his future claims. It is of almost as much importance that he become familiar with what may be produced or urged against him, as with what he himself will use in his own aggression or defence. His inquiries should thus extend to

witnesses supposed to be adverse, in order that their testimony may be foreknown, or at least that he may be assured of their hostility ; and where it can be done without deception or unfairness he may approach even the adverse parties, to ascertain their actual position and the modes by which they have determined to maintain it. Writings and objects also which are prejudicial to his case, so far as he can obtain access to them, he should examine with as much solicitude to understand their real significance as if he were to act as counsel on the other side. The discoveries thus made will lead to further investigations through his own witnesses and client, and in the direction of new witnessess and objects, until his knowledge of all the facts relating to the controversy becomes complete.

§ 134. Collection of Ideas by Inferences.

The method of collecting ideas which consists in inferring one fact from another is almost as serviceable as that of direct personal examination. This method is an act of reasoning as distinguished from sensation, and in order to attain the best results requires some practical acquaintance with the rules of logic. All men, however, constantly employ this mode of ascertaining facts, and as to all common and familiar things correctly draw conclusions from what they see and hear. In forensic oratory this process of deduction serves two different purposes : it aids the advocate in his investigation of the cause ; it also furnishes him with arguments by which his claim may be eventually demonstrated. In serving the first purpose, he may employ as the bases of his inferences facts which, though known, are not provable, and in this manner find his way to other facts that, when discovered, can be legally established. But in serving the latter purpose, only such grounds of inference can be improved as are already universally admitted, or have been properly produced in court.

§ 135. Inferences: Four Classes.

There are four simple forms to which all inferences may be reduced: (1) An affirmative from an affirmative,—this is, therefore that is; (2) A negative from a negative,—this is not, therefore that is not; (3) A negative from an affirmative,—this is, therefore that is not; (4) An affirmative from a negative,—this is not, therefore that is. An instance of the first form is when the ownership of chattels is inferred from their possession; of the second, where the non-payment of a note is inferred from its non-surrender to the maker; of the third, an alibi; of the fourth, where, from the established innocence of one of the only two persons to whom guilt can be imputed, the guilt of the other is inferred. All of these forms except the fourth are constantly in use in nearly every cause investigated, by far the greater portion of the facts being discovered by their aid.

§ 136. Inferences: Necessary, Probable, or Possible.

Some inferences are necessary, others probable, and others merely possible. A necessary inference is one in which, if the first fact be established, the other must inevitably be true. A man is found stabbed to the heart, with the fresh print of a bloody right hand on his right forearm: the inference is necessary that some person other than himself was lately present, and with a bloody hand. A probable inference is one in which, if the first fact is true, the second fact is probable. Under a window which has been burglariously opened is seen a footprint with a peculiar mark across the toe. The boot of the accused corresponds exactly both with the print and the peculiar mark. The inference of guilt is probable but not inevitable, for other boots may bear the same peculiar mark, or some other person may have been wearing this boot, or the accused may have been on that very spot and still have no connection with the crime. A possible inference is one in which, although the first fact

be admitted, the second is as likely to be false as true. A roll of bills of small denominations and amount is stolen from a person in a crowded hall. A roll of bills of similar denominations and amount is found upon another who stood near him in the throng. The inference of guilt is possible, for the bills may be the same bills, and the possessor may be the thief; but it is not even probable, for any other person in the crowd had the same opportunity to steal, and bills of this description are too common to warrant a reasonable belief in their identity, where no actual evidence of such identity is offered.

§ 137. Inferences: Probable Inferences Sufficient for Judicial Direction.

In mathematics and the other abstract sciences necessary inferences are not infrequent, one proposition following from another with unerring certainty. But in the ordinary affairs of life facts which afford a necessary inference are very rare, and all men are compelled to act in matters of the highest import upon a judgment based on probabilities. Especially is this true of judicial action. No fact is ever so conclusively established that a court is safe from every possibility of error. The credibility of testimony rests on the probability, not on the certainty, that witnesses will tell the truth; and in its last resort, the judgment of a court, even when the sole fact in issue is directly proved, reposes on this inference of credibility. The rule in criminal causes, that the guilt of the accused must be established beyond reasonable doubt, means nothing more than that the probability of guilt must exclude every probability of innocence. The rule in civil causes, that only when supported by preponderance of evidence can the claims of the affirmative prevail, signifies merely that the greater probability must be in his favor. Judicial action is thus the estimation of probabilities; and however hopeless might at first appear the prospect of arriving at correct results by such

a process, the general justice and wisdom of judicial decisions proves that the process is sufficiently reliable.

§ 138. Inferences: Value of Possible Inferences.

Possible inferences are of no original affirmative value. They serve, however, to confirm a fact which other inferences render probable, and the greater their number, the stronger will be their confirmatory power. They also serve to limit the probability of other inferences, by showing that antagonistic theories are not without support, and thus sometimes become of immense negative importance in matters of defence and refutation. In this aspect they should always be carefully sought out and duly estimated, lest by their skilful use some essential proposition of the advocate should be so weakened as to fail him in his hour of need.

§ 139. Inferences: Elements of: Value how Estimated: Measure of Probability.

Every inference involves three elements: the fact from which the inference is drawn; the fact inferred; and that relation or connection between these facts which renders the existence of the one in some degree dependent on the existence of the other. The value of the inference is measured by the permanence and uniformity of this relation. When it is constant and universal, the inference is necessary and conclusive; when it is generally present, with few and rare exceptions, the inference is highly probable; and in proportion as exceptions commonly invade the rule does probability decrease, until the rule and the exceptions balance each other, and the inference becomes simply possible. The power of estimating probabilities is thus derived from an experience or knowledge of the frequency of this connection between the facts known and the facts inferred, and is to be acquired by careful study of the attributes of things, and an attentive observation of their mutual relations.

§ 140. Inferences: Value Tested by Reducing to Syllogistic Form.

Every inference is capable of being stated in a syllogistic form, in which the minor premise is the fact from which the inference is drawn, the major premise is the relation, and the conclusion is the fact inferred. One of the most familiar inferences in criminal law may thus be stated:—

Major premise: The recent, exclusive, and unexplained possession of stolen goods indicates that the possessor is the thief.

Minor premise: The stolen goods in question were found in the exclusive, unexplained possession of the accused immediately after the theft.

Conclusion: Therefore the accused is guilty of the theft.

This inference is not a necessary one, for such possession is possible without guilt on the part of the possessor; but so rarely is this true in actual experience, that the inference of guilt arising from possession is highly probable. The error, if there be one, in this as in all other inferences of fact, is in the major premise. The minor, or fact proved, presents no difficulty, and the conclusion, if the major be correct, is undeniably. Hence, in this method of investigation it is always useful to formulate the major premise, and carefully examine it, before the fact which constitutes the minor is assumed to be important; for if the major is untrue in fact, or is too broadly stated, no reliable conclusion can be thence obtained. No one who should thus formulate his major premise, "He who stands near another in a crowded hall when he is robbed of certain money, and has upon his person money of a similar appearance and amount, must be the thief," would ever prove his minor as the basis of an inference of guilt. And, on the contrary, he who should state, "No man can with his own right hand take hold of his right forearm," would hesitate to prove that the bloody print of a

right hand was on the right arm of the dead, or to infer from it that he was not alone.

§ 141. Inferences: Issue Indicates what Facts are to be Sought for by this Method.

In searching for ideas by this method the advocate is not left to grope his way, without a guide, among the theories which are suggested by the facts. An inference that does not aid him in his claims upon the issue is of as little value to him as an irrelevant fact, and when the issue is discovered it clearly indicates the inferences which he requires. Where it is yet unknown, and cannot be determined until his knowledge of the facts has been completed, he has only to proceed with vigilance and caution from one fact to another, at each new stage of information querying what possibilities the truth which he has ascertained suggests, until all lines of inquiry have been exhausted, and he is certain that he knows whatever may be known.

CHAPTER IV.

OF THE COLLECTION OF IDEAS CONCERNING MATTERS OF LAW.

§ 142. Ideas concerning the Law of the Cause Collected by Direct Investigation and by Inference.

Ideas concerning the production and admissibility of evidence, the legal relation of the facts proved to the issue, and the principles which govern the decision of the cause, must be obtained, wherever the rules of law are formally expressed, by the direct examination of those rules themselves. When no formal statement of a rule touching the point in question can be found, the principle controlling it may be inferred from other rules, and be made law by receiving the express sanction of the court. These methods of investigating law are equally legitimate, and though the former is more certain and direct, and in many cases excludes the latter, yet when the latter can be properly employed its ultimate results are of no less authority.

§ 143. Direct Investigation: Formal Statements of the Law: Classes of.

The formal statements of the law are contained in statutes, definitions, maxims, precedents, and rules of court. Among these statements, statutes, including those written constitutions which grant or limit governmental power, occupy the highest rank. Maxims and definitions, deriving their authority from universal assent as well as from judicial sanction, stand next in order. Precedents, or decisions by which new rules are formulated, although they are expressions of the law, yet until by long observance they become established

principles of action, are liable to be reversed or modified, and hence are guides of less reliability. The rules of court, subordinate as they are to statutes and to precedents, although embodying many of the weightiest maxims of the law, are properly the last in legal obligation.

§ 144. **Direct Investigation: Statutes.**

Statutes, except when they refer to subjects of a recent origin, are always in some measure related to the doctrines of the common law. Certain statutes declare and confirm these doctrines; others complement, or alter, or apply them. A written constitution is the enactment of a people who already had their settled theories of political power and duty, which it is the object of their constitution to realize and execute. In the light of these antecedent principles and doctrines must the constitution and the statutes be interpreted. The entire written law connected with the subject, and the entire common law as modified, extended, or restricted by the written, must be examined, not as if their various provisions were the isolated fragments of a broken chain, but as one complete, harmonious, and organic whole.

§ 145. **Direct Investigation: Definitions and Maxims.**

The definitions and maxims of the common law are the formal expressions of the fundamental principles on which the system of the law is based. They are the result of ages of elaboration, and have received the approval and submission of the great exponents of the law in every generation. When properly applied, they are recognized by all courts as correct statements of the law, which no man is at liberty to dispute or to ignore. A definition is the enumeration of the essential attributes which characterize a legal entity, whether it be a right or duty, a contract or a crime. A maxim is the technical expression of some legal proposition which is uni-

versally admitted as just and reasonable. It is so called (*maxime*) because it hath the greatest dignity, the most certain authority, and is in the highest possible degree approved by all men. Maxims embrace rules of evidence and of construction, as well as rules of legal obligation. Some of them in a single sentence contain the entire law of a subject, and answer every question which its consideration may involve. Taken together, they constitute a body of law of small dimensions and easy of remembrance, invaluable to the advocate, not only from its accuracy, brevity, and clearness, but from its familiarity to all who are connected with the practical administration of the law.

§ 146. Direct Investigation: Precedents.

Decisions of the same questions by the courts of last resort in the same jurisdiction have, until overruled, the force of law. The opinion of the judge who utters the decision must here be carefully distinguished from the decision of the court itself. The decision is the judgment of the entire court, or a sufficient number of the judges, upon a legal proposition submitted to them, and nothing more. The scope of this decision, and the rule of law which it enunciates, can be determined only by ascertaining the facts in controversy, and the legal questions which arose out of these facts and were submitted to the judgment of the court, and were, moreover, passed upon by it in rendering the decision. But the reasonings by which the judgment is supported, and the illustrations by which it is explained, are the mere private utterance of the judge, and of no higher authority than if delivered by him in an argument as a lawyer at the bar. Before relying on a decision as a guide, it is also essential to determine the exact identity of the points now in question with the points then decided. Every cause is a fact, or an aggregation of facts, out of which arise certain legal questions;

and a decision is an answer to these questions in their connection with those specific facts. Questions of the same general character arising out of different facts do not constitute the same case, nor do they necessarily demand the same decision. Hence, a decision is law only for cases involving the same facts, and presenting the same questions. As to all other cases, it is but the basis of an inference.

§ 147. Direct Investigation: Rules of Practice.

Practice embraces all those methods of procedure which, either by judicial order or by long usage and obedience, have become established as the customs of the court. They relate not merely to the conduct of a trial, but to all other matters which are not regulated by the provisions of the statutes, or by the maxims, definitions, and decisions of the common law. They bind the court as well as the parties, and can be departed from by either only when superior authority or manifest reason and justice so require. They constitute the atmosphere in which the advocate lives during the presentation of his cause to the judge or jury, and form the medium through which he communicates with the opposing counsel, the witnesses, and the court. They are the actual interpreters of law, the concrete form in which its theories and propositions are embodied, the application of its rules to the practical and personal affairs of men. The law of evidence, however stated in the books, is really the ruling of the court upon the special inquiry to which objection has been made. The law defining right and wrong is only that which the judge gives the jury as their guide in determining the issues in the cause. "Praxis judicium est interpres legum" is thus a maxim which does not so much confer authority as formulate an inevitable truth; and hence, in weighing any legal question which is to be submitted to a court, its rules of practice must be properly regarded.

§ 148. Inferences of Law: their Sources, Forms, and Tests of Value.

The sources from which inferences of law may be derived are: (1) The settled principles expressed in statutes, definitions, maxims, precedents, and rules of practice; (2) Decisions of the same point in other jurisdictions; (3) Decisions in analogous causes; (4) Considerations of public policy and of the general spirit of the law. The primitive forms to which these inferences may be reduced, and the tests by which their value may be measured, are similar to those already predicated of inferences of fact.

§ 149. Inferences from Settled Principles of Law.

The inferences derived from settled principles of law are beyond all others numerous, direct, and conclusive. Many of these are, in effect, merely the application of a general rule to its particular subject matter,—the inference that what is true or false of a whole class of cases is true or false of each case which that class includes. Others result in the exclusion from the case of certain rules as inconsistent with the general rules that govern the entire class to which the case belongs. Others deduce from such a principle the falsity of one of two alternatives, and by this means the other alternate is demonstrated. Others extend a principle to a new class of cases through their analogy to other cases in which the principle has been applied; and others still create new principles possessing certain characteristics of the old, but differing from them in particular provisions to which the present case cannot conform. In the syllogistic statement of these inferences the major premise is generally the usual rule; the minor is the assertion of inclusion or analogy; and the conclusion is the rule desired. In such a syllogism, if the general rule is correctly stated, the error, when there is one, will be discovered in the minor premise; for if the case is not included in or similar to the class to which the prin-

ciple applies, the inference must fail. Sometimes it is the more convenient form of statement to reverse this order, asserting in the major the inclusion or analogy ; and not infrequently the inference requires a series of successive syllogisms, by which from one step to another the evolution of the elements of the main inference proceeds. In every instance, however, if the general principle has been correctly stated, and is clearly understood, the error to be dreaded is in whatever portion of the argument asserts the relation of the present case to those to which the principle belongs.

§ 150. *Inferences from Decisions in Other Jurisdictions.*

The inference drawn from a decision of the point in question in another jurisdiction proceeds on the assumption that the law of the two jurisdictions is the same. In such an inference the major premise is the statement of the law as it exists in the state where the question was decided, the minor is the assertion that the law of the two states on this point is identical. The minor, therefore, is the doubtful premise, and by its truth or falsehood the value of the inference is estimated. No state recognizes the decisions of another as possessing any controlling authority. It is at liberty to follow them or not, as it deems best. One court, however, rarely does, and perhaps never should, depart from a settled current of decisions upon any question, — the universality of a legal judgment giving it great weight, and indicating that the contrary doctrine is impracticable and hazardous. When such a current of decisions can be found, the inference which they afford is, therefore, next in value to those drawn from precedents and principles already recognized in his own jurisdiction. Where courts in different states disagree in their judgments upon any question, the value of such judgments in the present case depends in part upon the jurisdiction from which they proceed, and in part upon the court which rendered the decision. The courts of one state do

not regard the judicial legislation of all other states as equally entitled to consideration. When the genius of their institutions is the same, when their common law is derived from the same source, when the same historical traditions and the same general views of policy and equity prevail, a judgment is of far higher authority than when these similarities do not exist. The advocate will soon discover that in his own courts the opinions of many others are of little weight, while still others, in themselves no more reasonable or just, exert a powerful influence. Where on this account decisions have no special value, the character of the court deciding the question becomes an important element in estimating its authority. If the judges composing the court were lawyers of high repute, if the case were carefully argued by able counsel and fully considered, if the opinion is exhaustive, clear, and reasonable, the decision will at once assume the position of a leading case, and be everywhere regarded as the true expression of the law. While, on the other hand, if the court were obscure, the case submitted without argument, and the opinion hasty and unstudied, the decision is comparatively worthless. Moreover, the mere number of decisions does not aid the advocate, except so far as number leads to uniformity. A single case in point, arising in a kindred jurisdiction and decided by an able court after full argument and long consideration, is of more weight than a whole library of weak decisions, gathered from all parts of the continent, whose authors, though respected in their own jurisdictions, are utterly unknown in his.

§ 151. Inferences from Decisions in Analogous Cases.

A case so far dissimilar to the one at bar that its decision, though in the same jurisdiction, cannot be regarded as a precedent, may nevertheless resemble it in such material points that the rule governing the two should be the same. The law is a vast system of minute regulations, developed by the

application of a few great principles to the affairs of men. Whenever the application of these principles to one condition of affairs has resulted in the formal statement of a rule, that rule becomes the law for all identical conditions of affairs. And as these principles can never change, when a new case arises the rule which it demands must correspond with pre-existing rules in such proportion as the new condition of affairs is like the old. This mode of reasoning from similarities is analogy. In its syllogistic form the major premise asserts the similarity between the case decided and the present case, the minor states the doctrine of the cited case, and the conclusion predicates the same rule of the case at bar. The error, of which in this form of inference there is great danger, will always be found in the major premise. The doctrine of the cited case is generally clear enough to defy serious attack; but the assertion of such similarity between the cases as warrants the extension of the rule to both is often utterly without foundation. Hence, in employing analogous cases as the bases of his inferences, the advocate should formulate his dangerous premise with especial care, and thoroughly test its accuracy and truth. It is in this department of legal inference that the most splendid triumphs of forensic reasoning are achieved. It may win a cause to discover and produce an exactly parallel case from an authoritative court, but the victory is due rather to the ignorance or folly of the adversary, in contending in the face of an established rule, than to any skill or learning of the victor. The construction and application of a statute by the ordinary methods of interpretation are only a step higher. But when some new question calling for judicial legislation has arisen, and all the light which falls upon it from the past shines through the medium of analogous cases, the true work of the lawyer and the court begins, and then, if ever, do both display the vast resources of jurisprudence, and become not mere explorers, but creators of the law.

**§ 152. Inferences from Considerations of Public Policy,
and from the General Spirit of the Law.**

Some of the most conclusive inferences concerning points not yet decided are drawn from considerations of public policy, and from the general spirit of the law. The fundamental duty of all government is to protect the common interests of the whole people, even at the expense of personal and local interests. The entire system of the law is characterized by this idea. Examples where the individual suffers, in order that a rule necessary for the whole should be observed, constantly occur. The rule that negotiable paper, in the hands of a *bona fide* holder for value, shall be collectable at all events from the maker, is necessary to the proper maintenance of commercial relations, and, no matter how unjust or injurious it may be to enforce it in a particular case, the rule must be observed, and the individual must suffer. Courts, therefore, in deciding new questions are compelled to estimate the effect of their decision on the public interests ; and public policy, which is the duty of the court to protect public interests, forbids a judgment calculated to impair them. The same considerations which control the courts in their decision on a point entirely new are not without weight on the question whether an old decision shall be abrogated or confirmed. In spite of constitutions and decisions the world moves on, and changes in the political or social theories of men demand continual progress in the law. That application of a principle which was just and reasonable in a former age may be in this productive only of disaster ; and the same public policy which then demanded its adoption may now imperatively call for its repeal. Courts are not wholly deaf to such a call, and though with extreme caution, and perhaps by numerous successive steps, they still conform to the demand of public interest and current thought, and overrule or modify existing law.

§ 153. Inferences of Law, Correctly Drawn by the Advocate and the Court from the same Premises, will be Identical.

In reasoning from these considerations, as well as from decisions and analogous cases, the advocate is, of course, merely anticipating and forecasting the decision of the court upon the points in question. To one, however, who is truly qualified for his position, this fact involves no serious difficulty. The principles of law, by which the question is to be decided, are equally well known to him and to the court. The facts from which the question has arisen are ascertainable by him if he pursues his inquiries with diligence, and can be made apparent to the court if he presents them with persistency and skill. The application of the same principles to the same facts ought to and will produce the same results, whether the application be performed by thorough lawyers on the bench or by a thorough lawyer at the bar. Peculiar difficulties inherent in peculiar cases do no doubt occur, the final solution of which must be matter of conjecture rather than of judgment, and with no certain guide for either court or counsel their respective guesses may not always correspond. New subjects hitherto unknown in law, where from the yet uncertain character and bearing of the facts composing them doubt may exist as to the principles to be applied, often present this difficulty, and for a time experience this evil. But when a given condition of affairs has been so far developed as to acquire a character determinable in the law, the only chance of disagreement between the judges and the advocate is found in want of knowledge or in want of dialectic skill. If these are wanting, the court and counsel have themselves to blame.

CHAPTER V.

OF THE SELECTION AND CLASSIFICATION OF IDEAS.

§ 154. Selection of Ideas.

There are few causes in which this method of investigation, if faithfully pursued, does not result in the collection of numerous ideas. Among these there are, however, many which, though eminently useful during the investigation, are of no value when the inquiry is at an end, either because they cannot be legally presented to the triers, or can exercise no favorable influence on their decision. Immediately after this investigation, therefore, follows a process of selection, by which the chaff is separated from the wheat, and the ideas serviceable to the advocate are alone retained.

§ 155. Selection of Ideas: Rejection of Unavailable Ideas: Classification of Available Ideas.

As the first step in this process, every fact that is not already known and cannot be directly proved or logically inferred from other facts already known or provable, every legal proposition which does not rest on sound deduction or on recognized authority, and every idea, whether of law or fact, which is not sufficiently connected with the issue to affect its decision, is excluded from further consideration. In this exclusion the advocate should err rather through an excess of rigor than by undue indulgence toward any doubtful matters, since, of whatever value these may have already proved, their further presence in the cause can only be a source of weakness, either by embarrassing his judgment as to its merits and

requirements, or by offering vulnerable points for attack, of which his adversary will not fail to take advantage. The remaining ideas are then to be grouped in four divisions : (1) The ideas directly favorable to his side of the cause ; (2) The ideas directly unfavorable ; (3) The ideas qualifying or negating favorable ideas ; (4) The ideas qualifying or negating unfavorable ideas ; — thus exhibiting the entire cause to his own mind as it will finally be presented to the court, with all its points of strength and points of weakness arrayed in opposition to each other.

§ 156. Classification of Ideas : its Importance : Enables the Advocate Properly to Advise his Client.

This presentation of the entire cause to the advocate, at this stage of the proceedings, serves several important purposes. It is his fundamental duty fully to comprehend his case before he ventures to advise his client whether to compromise, abandon, or contest it ; and after he has comprehended it, to give him such advice as the facts and the law require, honestly and regardless of consequences. In actual practice there often are, however, influences operating upon his mind which tend to obscure his vision and pervert his judgment. Nothing is more natural than that an ardent advocate should so zealously espouse the claims of his client as to become most desirous that they should prevail, and that, misled by this desire, he should unconsciously endeavor to create a cause in which success may certainly be secured. The young lawyer is especially liable to feel that, in whatever business is intrusted to his care, he must discover some way to realize his client's hopes, and that if he cannot find a way he must make one. That this view of the duty and position of the advocate is utterly erroneous needs no proof. It is no part of his vocation to *create* a case. In most instances the cause exists, in the completeness of its facts

and obligations, before his connection with it has commenced, and his sole duty is to investigate it thoroughly and properly present it to the court. Intentionally to broach and maintain legal propositions which he knows to be fallacious, or to assert and make pretence of proving a claim of fact which he believes to be without foundation, is a gross breach of his official oath, and is almost certain to result in the failure of his cause. If on the facts and law, as far as these are ascertainable, he has no case, it is his business to discover it and so inform his client, in order that the adversary, with whom resides the legal right, may have his remedy without delay. Even in criminal causes, where the law holds no man guilty unless his guilt is capable of being legally proved, the advocate can go no farther in protecting the actual criminal than to secure for him his legal rights, and hold the commonwealth to the complete proof of the crime alleged. It is, however, unfortunately true that contrary practices prevail, and that an advocate is often expected to contrive defences where no real defence exists, and to find solid basis for a claim which has no actual support either in the facts or in the law. Hence the strong temptation which sometimes besets him to search for those ideas only which uphold the theory he wishes to confirm, and to ignore or undervalue those ideas which contradict or qualify his claims. This temptation cannot safely or honorably be encouraged. The judges and the jury will not experience it. The case will appear to them as it really is, if the opposing advocate is diligent and skilful, and in their desire to do their duty they will give little heed to fantastic theories. No better method of escaping this temptation, and of overcoming it when it occurs, can be desired than the attentive examination of the ideas presented by the cause itself, grouped in this fourfold manner, with their connections and antagonisms thus disclosed.

§ 157. Classification of Ideas: Exhibts the Value of each Idea as a Factor in the Cause.

This classification also enables the advocate to estimate every idea, favorable or unfavorable, at its true value as a factor in the cause for the consideration of the jury or the court. The force of the impression made upon the mind by any idea depends, in part at least, upon the character of the impressions concurrently received ; and inasmuch as all the ideas in the cause are to be presented with substantial simultaneousness to the hearers, the result of one can be determined only by viewing it in its relation to the others. An idea, too trifling in itself to demand a moment's notice, often becomes the key of the whole case through its connection with other ideas, to which it gives a new character and significance. An idea, which alone may seem conclusive of the issue, may be so modified and attenuated by the operation of its related ideas as to render little service. The markings of a bullet found within a body are in themselves, perhaps, of little consequence ; but when their correspondence with the groovings of the victim's pistol, and their want of correspondence with the groovings of the pistol of the accused, are demonstrated, they assume the highest importance upon the question of suicide or murder. A receipt in full appears sufficient to defeat the claim, until the fact that it is based on a mistaken balance, or was obtained without the full concurrence of the maker, is made manifest. The true value of an idea to the advocate is, therefore, its value as determined by its inherent force, qualified by all the other ideas presented in connection with it, and thus its real utility can be estimated only by viewing it in the midst of these connections.

§ 158. Classification of Ideas: Enables the Advocate to Forecast the Operations of his Adversary.

Where the mental habits and proclivities of the opposing advocate are known, this mode of classification also indicates

the issues which he will create, and the methods of aggression or defence that he will probably employ. The adversaries of an advocate are usually his own associates, frequently his most familiar friends ; and if he has made a proper study of their modes of thought, and of their management of causes at the bar, he should find little difficulty in forecasting the manner in which any case will be conducted by them when once its various elements are clearly spread before him. Such knowledge enables him not only to construct his cause more securely, covering its weakness and displaying all its strength, but often also to turn away the attention of the adversary from his own designs, and in the heat of conflict to take him unawares.

§ 159. Selection of Classified Ideas: Principles Governing the Selection.

The real merits of his cause, and the actual condition in which it is likely to appear to the court when the testimony is concluded and the adverse argument is made, being thus fully comprehended by the advocate, he may then proceed to the selection of those ideas by which he will endeavor to support his claims, and secure from his auditors a favorable judgment. In making this selection he must have regard : (1) To the character of his auditors, their present attitude toward his cause and the ideas which it embodies ; (2) To the manner in which they will be affected by the media through which his ideas are to be presented to them.

§ 160. Selection of Classified Ideas: Value of an Idea Determined by the Character and Attitude of the Hearer.

One of the most dangerous errors into which the advocate can ever fall, is that of measuring the value of the ideas collected by him according to the strength of the impression which they make on his own mind. No less reliable test

than this affords could be imagined. The impression made by any idea on the mind depends so largely on the previous disposition and mental habit of the individual addressed, that no similarity of impression from the same idea is probable, unless the habits and predispositions of the persons are the same. Hence, separated as the advocate generally is from his auditors by his natural characteristics, his education, and his interest in the cause, the likelihood that matters which impress him strongly will have a similar effect on them is too small to warrant his adoption of his own feelings as a guide in the selection of his method of affecting theirs. And inasmuch as all the ideas presented in the cause are designed solely to influence those by whom it is to be decided, no fact or argument will be of any value unless it produces in their minds an impression favorable to his case ; and no fact or argument by which a favorable impression is produced will be useless, however insignificant and worthless it may seem to the advocate himself. Next in the order of performance to the duty of fully mastering his case, though equal to it in importance and necessity, is thus the duty of understanding the temper and predisposition of his hearers. In reference to the judges, this duty involves little difficulty. Few in number, exercising their functions within narrow territorial limits, taken directly from the bar and still intimately associated with their former brethren, no advocate of ordinary astuteness is long without a fair acquaintance with their natural tendencies and modes of thought. Their personal characteristics also, more than those of other men, enter into their daily lives and manifest themselves in their official conduct. They are subject to few counterchecks, seldom reminded of their own failings, flattered by those for whom they decide and fawned upon by those who seek their favorable judgment, and under such influences, unconsciously often to themselves, their idiosyncrasies develop into such extremes as to constitute a most important and apparent

factor in every case where their judicial action is invoked. In reference to the jury this task is much more troublesome. Most of them are generally strangers to the advocate, perhaps also strangers to the parties, to the officers of the court, and to one another. Even among their neighborhood acquaintances little is known concerning their real interior dispositions, and access to such sources of information is also usually impracticable. Having exhausted all his means of personal investigation, the advocate must fall back on his general knowledge of the thoughts and feelings which actuate the classes of mankind to whom the members of the jury may belong. He must consider the temper of the times, the current of popular opinion, the prejudices of locality and race, and all the other influences to which they are subjected, and which he may have opportunity to ascertain. In this mode he may almost always arrive at a sufficiently complete view of their characters and dispositions to enable him to select his ideas, and to determine on the method in which they can be most effectively presented.

§ 161. Selection of Classified Ideas: Ideas to be Selected in View of their Known Effect upon the Hearers.

Ideas should be selected by the advocate in view of their known effect upon the auditor. To a jury with whom he is personally unacquainted only the most general and evident ideas can be safely suggested. Matters which are apparent to all men of their class will be apparent also to them, and principles and lines of conduct which the class approves they will be ready to admit and to pursue. Any descent into particulars, any assertion of special theories and duties, is likely to arouse some secret prejudice, to stir some long concealed antagonism, and create an enemy where he seeks a friend. As knowledge guides him to the ideas which he may employ, ignorance warns him what to leave unuttered, and to content himself with urging home the thoughts which,

while they excite no hostility, impress upon the jury the justice of his cause and win their favor for his client. The same course is to be pursued in reference to an unknown judge. The existence in him of peculiar aptitudes for the discovery of truth, of extraordinary learning or clear-sightedness, of any leaning toward or against certain legal theories, must never be presumed. With him, as with an unknown jury, the advocate should take his stand on those truths which all judges alike acknowledge, and urge his cause by those general considerations which possess universal control over the judicial mind. All that he knows will serve him he is at liberty to use, but of employing that concerning which he has no perfect knowledge let him as far as possible beware.

§ 162. Selection of Classified Ideas: Ideas to be Selected in View of the Medium through which they must be Presented to the Hearer.

In making this selection the advocate must also have regard to the method by which the idea is to be presented to the hearer. The natural effect of an idea upon the mind is largely modified by the character of the medium through which it is conveyed. The same principle of law which when enunciated by certain judges, or explained by certain commentators, appears too simple and self-evident to permit discussion or dispute, when proceeding from the lips or pens of others loses half its force. The same fact which when testified to by a witness well known to a jury, or of apparently estimable character, is accepted by them as completely proved, if resting on the evidence of a stranger of ill appearance or of alien race is received with hesitation, and sometimes not believed at all. It may be true that at the time of the commission of the crime the accused was in a far distant place, and could have had no possible connection with it. If the witnesses by whom this fact can be estab-

lished are above suspicion, and can testify in an impressive and convincing manner, no stronger defence than such an *alibi* could be desired. But if the witnesses are of doubtful character, of suspicious manner, of dull and hesitating utterance, the advocate would do well to seek for his defence elsewhere. The idea actually impressed upon the auditor is not the idea as it might be categorically stated by the advocate, or as it exists in the fact which it represents, but it is the sum total of the impression made upon the auditor by the idea itself and the medium through which it is conveyed. For this reason it sometimes occurs that from the manner in which a witness testifies to a fact, in itself true and undisputed, the jury are convinced that no such fact exists,—the ultimate impression on their minds being the exact contrary of the evidence and of the truth. Too little attention to this subject is often given by advocates. If a fact exists, and somebody will swear to it and none can contradict it, they assume the fact to be established, and to constitute a proper matter to be offered to the jury. Or if a legal rule which justifies their position can be found in some obscure treatise, or decided case of no great repute, and no decision or assertion to the contrary can be discovered, they rest on it as settled law, and stake upon its soundness the future of their cause. To any one of sober thought it is no wonder that cases thus supported and presented fail, while counsel who are themselves in fault deplore the stupidity of juries and the uncertainty of verdicts. The same counsel sitting in the place of judgment, without interest in the cause, and receiving the same ideas through the same media, would probably arrive at the same conclusion as the jury whom they ridicule, or the judges whom they blame.

§ 163. Arrangement of Selected Ideas.

The ideas thus selected by the advocate for presentation to the court should next receive such general arrangement as

shall give each its best effect, and enable each to render to the others its fullest support. In the movement of the minds of the auditors from present indifference to favorable decision they will pass through four stages of thought and feeling, arising in the following order: (1) Interest in the advocate or the cause ; (2) Knowledge of the claims of the advocate ; (3) Belief in their truth ; (4) Determination to acknowledge and enforce them. The same order, therefore, should govern the succession of ideas by which these dispositions are to be produced ; and in his final classification of the ideas he intends to use the advocate should place (1) the ideas which conciliate or attract the attention of the jury ; (2) the ideas which reveal the nature of the cause, and the claims of the advocate concerning it ; (3) the ideas which establish the truth of those claims ; and (4) the ideas which develop conviction into persuasion, and arouse the strongest impulses which the cause permits. This arrangement constitutes the scheme by which his future conduct of the case is guided, and by which every presentation of ideas to the court and jury is controlled.

CHAPTER VI.

OF THE PRESENTATION OF IDEAS BY THE PRODUCTION OF
EVIDENCE IN COURT.§ 164. **Forensic Oratory Communicates Ideas to the
Hearers in Many Ways during the Conduct
of the Trial.**

In many forms of oratory the ideas of the orator are communicated to his hearers entirely by his own spoken words. In forensic oratory, on the contrary, various other methods of communication are employed, some of which are only less efficacious than the formal oration itself. In fact, the whole conduct of the trial is an act of oratory; the impressions made upon the court and jury by each word and incident during its progress being favorable or unfavorable to the result at which he aims. All that occurs in the impanelling or challenge of the jurors, in the argument of preliminary or interlocutory questions, in the production of evidence, and in the altercation of the opposing advocates; the statements of the witnesses, together with their personal appearance, manners, and apparent truthfulness or falsehood; the attitude of the court toward the parties, witnesses, and counsel;— all these directly operate upon the minds and hearts of the judge or jury, and influence the decision at which they eventually arrive. Hence always and everywhere the advocate should keep before him both the advantages and exigencies of his cause, that he may make the most of every favorable event, and avoid or palliate the circumstances which might prejudice his claims.

§ 165. Production of Evidence in Court not a Mere Search for Information.

The production of evidence in court is too often regarded by the advocate as a mere process of investigation, and is pursued by him as if his only object were to elicit information from the witnesses for future use. That this is one of its essential purposes, and that it sometimes serves this purpose in a most efficient manner, is doubtless true ; and hence it may be properly considered as an act of invention. But such is not its principal design. The advocate is presumed to know already, and so far as possible is bound to know, every fact which is material to his cause. But the law does not permit him to communicate these facts directly to the jury, however competent his knowledge and reliable his words. It prescribes certain methods by which they must be established, and until established in these methods prohibits their consideration. These methods, the principal of which is the production of evidence in court, it places at the disposal of the advocate, in order that through them he may assert and demonstrate the facts on which his claims are based. The witnesses presented by the advocate are thus the channels through which he transmits his knowledge to the jury. Their testimony is not their act ; it is his act. They have no option whether to be heard or to be silent. They have no control over the ideas which they possess. They are permitted to convey no further information than his inquiries evoke, and when relevant to his questions their answers are received as his assertion of the fact disclosed. Through them he speaks. Their words supply expression to his thought ; their utterance and manner for the time being are his own.

§ 166. The Production of Evidence in Court a Complete Oratorical Act.

The production of evidence in court is, moreover, in its real character, a complete oratorical act. Its object is not

only to convince, but to persuade. It is intended not merely to demonstrate certain propositions, but to present them with such energy as to excite the impulses to which they correspond. The oral testimony of a prepossessing witness, if skilfully arranged and agreeably and forcibly delivered, is itself a true oration. It conciliates the hearer toward the witness, and also toward the cause for which his evidence is given. It produces faith in the correctness of his assertions, and awakens sympathy with him in his apparent interest in those who call him. It engenders a conviction that the party for whom he appears is in the right, and a disposition to express this conviction by a favorable verdict. It often has more influence than the utterances of the advocate himself, since no suspicion that he acts a part attaches to a witness, and his disinterestedness, if not established, is generally presumed.

§ 167. Importance of Properly Selecting, Training, and Presenting Witnesses.

From this view of the real character and purpose of the evidence produced in court arise several practical suggestions concerning the choice and preparation of the witnesses, as well as the order and method of their examination in the presence of the jury. As no wise client would select a diffident or witless advocate to represent him in the conduct of his cause, so no wise advocate will voluntarily present his ideas to a jury through a vacillating or repulsive witness. A witness is not a magazine in which ammunition is deposited, and therefore useful in proportion to the quantity which he contains. He is a weapon through whom shot and shell are to be hurled against the foe ; a rifled cannon when his evidence is prompt and positive ; a wretched popgun, provoking contempt for the whole battery, when his words are hesitating or his purpose weak. It is impossible to render testimony impressive by accumulating feeble and forgetful

witnesses. Mere number is not strength. The weight of evidence cannot be ascertained by counting polls. The advocate who seriously considers that all his witnesses are to speak for him, that they are actually his associate advocates, and that the effect which they produce will be as strong and permanent as that resulting from his own oration, will need no further incentive to secure such as possess the necessary qualities, to bestow on them whatever training they require in order to render their evidence clear and forcible, and to exercise his highest skill and sagacity in his presentation of them to the jury.

CHAPTER VII.

OF THE QUALIFICATIONS OF WITNESSES.

§ 168. Qualifications of the Witness Resemble those of the Advocate.

The qualifications necessary to a good witness are as numerous, and of as high an order, as those of a good advocate. In some respects their qualifications are identical, since the ultimate purpose of both testimony and oration is to convince and to persuade. In other respects the position of the witness is the most important and the most difficult, and to fill it properly requires of him a nobler manhood and a more severe self-discipline.

§ 169. Qualifications of the Witness : Clear Ideas of the Fact to which he Testifies.

Pre-eminent among the qualifications of a witness is the clear, precise conception of the fact to which he testifies. If his ideas concerning it are confused and fragmentary, if they are partly the result of his sensations, partly inferences drawn from other facts, and partly half remembered hearsay, however certain he may be of the truth of what he is to utter, it will be of little value to the cause after it has been rent and torn and twisted by a dexterous cross-examination. No one can be a good witness who does not know what he knows, and who has not formed in his own memory and imagination such a complete and definite representation of every fact or event which he is to describe, that he can answer positively and intelligibly any question that he may be asked concerning it.

§ 170. Qualifications of the Witness: Knowledge of the Relation between the Issue and the Fact to which he Testifies.

Again, a witness must understand the relation which exists between the fact to which he testifies and the issue in the cause. This is essential for many reasons. The idea that he conveys derives much of its force from the language in which it is expressed, and the manner in which it is enunciated. A fact which he considers of no consequence will naturally be stated in a careless manner, and in words barely sufficient to convey his meaning. Thoughts which seem to him important will just as naturally be clothed in energetic and impressive language, and be delivered with intensity and feeling. Almost as well might the advocate himself undertake to move his hearers without knowing the precise object to be accomplished, as to place before them a promulgator of his ideas, who must control the method of their utterance while ignorant of the purposes for which they are communicated. Moreover, as the witness is permitted to express his ideas only in response to the questions of the advocate, this mutual knowledge of the object sought is necessary to enable one to form, and the other accurately to comprehend, the inquiries by which the ideas are to be elicited. If the witness understands the pertinency of his evidence, and the general purpose of the advocate in presenting it, he will also perceive the meaning of the detailed questions that are addressed to him, and the answers they are intended to evoke. Examining counsel and a willing witness are never at cross purposes when they understand each other; and if the advocate is familiar with the ideas in the mind of the witness, and the witness with the precise object of the advocate in calling out these ideas, all mistakes on the part of the latter, and all failures to elicit ideas by the former, are prevented. Furthermore, a witness who knows the precise application of his testimony to the cause is far more secure from injury by

cross-examination. The real point of the cross-examiner's attack is thus foreknown. On all other subjects the witness answers easily and fully, without suspicion or embarrassment, but when this stronghold of the cause is approached he becomes cautious and decided, and misses no opportunity to render more impressive the idea which he has previously conveyed. Any one familiar with the testimony of experts, or of detectives who have been engaged in the preparation of a case, must have remarked the eminent advantage in all these respects enjoyed by one whose witnesses understand the cause as well as their own relation to it, and who consequently know when and how to speak and when to preserve silence.

§ 171. Qualifications of the Witness: A Good Appearance and Pleasing Manner.

A witness should be of good appearance and engaging manner. A frank and honest countenance, a neat, appropriate attire, a modest, courteous demeanor, a good voice, please and captivate a jury, and insure attention to whatever such a witness may assert; while their prejudices are inevitably excited against a mean or filthy personage, or one whose manner is uncouth or disagreeable. Few audiences distinguish less between the thought and the channel through which it is communicated than do a jury receiving ideas from a witness. To them the man and the testimony are but a single impression, the character and credibility of the latter depending far more on the appearance of the former than on the inherent truth and force it may possess. Skilful advocates understand this fact so well that they often produce witnesses of noble mien and fine deportment, solely on account of the impression which the appearance of such persons on their side of the cause will make upon the jury, although the evidence they may give is in itself of little value.

§ 172. Qualifications of the Witness: Familiarity with Customs and Proceedings of Courts.

Another requisite of a good witness is familiarity with the customs and proceedings of the courts. There is a natural tendency in the human mind to despise any individual who manifests an inferior knowledge of affairs. A jury, already more or less at home within the court-room, are quick to notice awkwardness and strangeness in a witness, and to regard him with a mingled pity and contempt, scarcely consistent with the submission of their minds to his ideas. Every blunder he makes intensifies this feeling, and weakens the force of the evidence he gives, and if he errs so far as to provoke the interference of the judge, they are more ready to require an apology for his production than to accept his statements as their guide. The witness himself, also, both for his own sake and that of the side that calls him, needs such familiarity. A more trying situation than that of a witness on the stand is scarcely imaginable. He is the observed of all observers. The jury, judge, counsel, and audience sit gazing in his face, and measuring his words. He is compelled to attend to questions, and instantly conceive and frame his answers. During a portion of the time he is liable to be tormented and badgered by a cross-examiner. He is ordered to do this and that, interrupted when he is about to speak, and commanded to speak when he has nothing to say. He is treated as responsible for all the errors he may commit against the rules of evidence or the decorum of the court-room, as if they were the result of intelligent and voluntary action. Under such circumstances an individual of any sensibility, who is unaccustomed to the court, is necessarily uncomfortable. His mind does not work with entire freedom, his recollection is seldom at its best, and his manner is prone to be constrained and artificial. Every interruption he experiences, every rebuke he receives, increases his embarrassment, diminishes the clearness of his

memory and the positiveness of his assertions, and disposes him to new and greater blunders, until finally he loses all his certainty of anything, and becomes an injury to the cause which he endeavors to uphold. To secure immunity from such disasters, the witness ought to be habituated to the scenes and operations of the court-room. Not that the immunity thus acquired is perfect, for even an accomplished lawyer, when acting as a witness, will sometimes undergo a disagreeable experience. But every one who is familiar with the ways of courts will labor under less embarrassment and perturbation, will be less likely to commit mistakes, and will do greater credit to himself and to his cause than he could have done if he had been a stranger to the forum. He will at least understand better his relations to the court, and realize more fully that, when not compelled to speak, the safety of a witness is his silence.

§ 173. Qualifications of the Witness: Quick Wit and Sound Judgment.

A prompt and active intellect, and a sound judgment as to the significance of human looks and conduct, are also necessary to a witness. However strictly he may be guarded by the advocate during his direct examination, while under cross-examination he is left to struggle by himself against the assaults of a wily and experienced foe. This is an emergency which demands the exercise of his highest powers. Forced to reply to questions whose ultimate purpose he can only conjecture, alternately stormed at and fawned upon, confronted with his answers previously given and challenged to explain apparent inconsistencies, whatever keenness of apprehension, whatever quickness of wit and judgment, he may summon to his aid, can never be superfluous. He should be able to read the thoughts of men in their appearance sufficiently to detect the difference between earnestness and bluster, between a true consideration for the difficulties of

his position and the specious kindness which aims only to draw him into error. He should recognize when it is safe to answer boldly, and when caution is wiser than defiance. He should watch the effect of the progressing conflict on the court and jury, and know when to press home an apparent advantage, and when to seek a courteous and secure retreat. He should scent danger from afar, and without seeming alarm turn from it and avoid it. He should be sensitiveness itself to every look and hint of his own counsel which is suggestive of the purpose of the enemy, and when that purpose is perceived should strive himself to be the aggressor, and lead the adversary on by cunning answers, until the opportunity is offered to state with renewed vigor some fact already mentioned, or to disclose some new fact hitherto inadmissible. This contest between the witness and the cross-examiner has always been regarded as a most unequal one, and in practice it is generally so. But there are instances where Greek meets Greek, where in the witness box appears a witness in every way worthy of the steel of the inquisitor in dialectic fence, in readiness of wit, in knowledge of mankind, in definiteness of purpose; and in the tug of war between such heroes it is not always the witness who is driven to the wall. Cross-examination, ever perilous in unskilled hands, becomes positively dangerous to a skilful advocate just in proportion as the witness is his equal in these several characteristics. and the danger of the advocate is the safety of the witness.

§ 174. Qualifications of the Witness: An Even Temper.

Another requisite of a good witness is an even temper. An irritated mind is rarely gifted with clear ideas on any subject, present, past, or future, and is prone to manifest itself in exceeding readiness of speech; two qualities which involve a witness, who testifies while in this condition, in endless contradictions. A statement made while under the

apparent influence of passion never wins belief from any one, much less from a jury whom the passion itself, except in some rare cases when they deem it justifiable, tends to antagonize and repel. To make a witness angry is usually to destroy him. As he loses his own self-command, he falls into subjection to the hostile advocate, who can then make him appear untruthful, prejudiced, unreasonable, as he will. One of the commonest expedients adopted by the ordinary cross-examiner is to provoke the witness by insinuation or abuse until he is enraged, and then lead him into exaggerations and self-contradictions which annihilate the force of all the testimony that he has already given. An unruffled temper is thus essential to the safety and influence of a witness. Though the ordeal to which he is subjected is sometimes sufficient to disturb the equanimity of a saint, he should be able to curb his indignation, and give his whole attention to the questions of his enemy and his own replies. A conflict of this character is always brief. No advocate with any true conception of the interests of the cause, will pursue at length an unsuccessful effort to irritate a witness. The preservation of his self-control for a few moments, at the opening of the struggle, is therefore certain to give him the victory, while the visible retreat of his antagonist is an acknowledgment of his integrity and fortitude which the jury will not fail to recollect.

§ 175. Qualifications of the Witness: A Cautious and Considerate Disposition.

For the same reasons, a cautious and considerate disposition is a necessary attribute of a good witness. The witness who has already been examined in private by the advocate, and has thus discovered what facts within his knowledge are important to the cause, goes into the court-room for the specific purpose of delivering himself of this information. When called to testify, the impulse of a hasty witness is to tell all

that he knows without waiting to be questioned. He assumes that every inquiry propounded to him relates to one especial subject, and is thus led to anticipate the meaning of the question, and answer it before it has been fully stated. The evils thence resulting are as serious as they are unnecessary. A witness speaking under such an impulse, and utterly mistaking the real drift of the question, frequently contradicts the very matter he intended to assert, and involves himself in confusion, if not the advocate in hopeless perplexity. In cross-examination the matter becomes vastly more deplorable. To his own hastiness and want of due reflection is now added the stimulus presented by a questioner, whose only object it may be to confound the witness and entangle him in his talk, and who hurries and goads him from one topic to another with a rapid fire of interrogatories which draw forth answers, whose folly and inconsistency the witness himself sees, but has no time or opportunity to correct. It is the duty of a witness to listen carefully to every question until it is completed, to be certain that he understands it before he undertakes to answer, and to reply by stating just those facts within his knowledge which the question calls for, and no more. No witness can do this without consideration,—a consideration which requires both time and attention, and which few witnesses while on the stand can bestow unless it is habitual to their minds.

§ 176. Qualifications of the Witness: Truthfulness.

Finally, a good witness is truthful. With a witness who intentionally lies, no advocate can properly and honorably connect himself. To employ a witness because he lies is not merely criminal in the advocate, but places him morally in the same condition as if he were himself the perjurer. A truthful witness, however, is something more than one who does not intentionally lie. Of persons who actually attempt to tell the truth, and who believe they do tell it, there are many

whose imaginations are so strong, or their habitual language so exaggerated, that they never relate facts as they really are. Distance, duration, value, quantity, and many other matters, are by such witnesses constantly overrated or underrated, according to the impulse of the moment and the purpose which they are endeavoring to accomplish; and when the impulse has passed by, or the purpose is forgotten, precisely the same inquiry elicits an entirely different reply. A witness of this character quickly reveals himself to the jury, and is then disbelieved by them in regard to everything which he narrates. Moreover, his assertions are not infrequently taken by them as measures of the exaggerations and extenuations of other witnesses, and when their statements agree with his, so far from operating to corroborate his evidence, their testimony is discredited by his. A truthful witness is one who tells the exact truth, without increase or diminution, and employs language which conveys the precise idea which would be impressed upon the minds of the jury, had they been themselves observers of the fact. Such a witness is not liable to contradict himself, nor to be contradicted by others. His statements are probable, and bear with them the insignia of their credibility. The jury, impressed with their ability to confide in his assertions, give to his narrative the same submission as to their personal observation, and realize that any conclusion to which they may come upon his testimony must necessarily be sound. The evidence of such a witness fixes itself in their minds as the standard of the truth of other witnesses, who are believed or disbelieved just in proportion as they correspond with or are opposed to his.

§ 177. Qualifications of the Witness: Though Good Witnesses are Rare, Some are Usually Obtainable.

Witnesses who possess all these qualifications are very rare, even more rare perhaps than perfect advocates. Still

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among actual witnesses, as they are daily encountered in our courts, there is a wide diversity in reference to each one of these attributes, and witnesses are often found who are far advanced toward this ideal. In most causes the advocate has some choice of witnesses, and out of several who have knowledge of a fact is compelled to determine which and how many he will call. In all such cases the character of the witness, his ability to serve the cause as indicated by the degree to which he possesses these qualities, should be the only guide, — not, as is now too frequently the case, the convenience of summoning him or of his own attendance, whereby so many poor witnesses are put before the courts, and so many good ones remain unemployed.

CHAPTER VIII.

OF THE TRAINING OF WITNESSES.

§ 178. Training of Witnesses: How far Legitimate.

Although good witnesses are very rare, few witnesses are so poor that they cannot be improved; fewer still are so perfect that a careful training will not render them more valuable. In reference to one qualification, training is of course impossible. Ideas cannot be furnished to the witness by the advocate, to be repeated in the court-room as if they were derived from personal observation. But in regard to almost any other attribute training is legitimate, and is certain to produce desirable results.

§ 179. Training of the Witness: To Make him Comprehend the Facts to which he Testifies.

The point at which the witness and the advocate first meet is the point at which the training of the former will properly begin. When the advocate has heard the story of the witness, and has examined and cross-examined him upon it until the assertions which may survive may be relied upon as representing facts, these should be written down, and submitted to the witness as the statement expected from him on the stand. With the facts embodied in this statement he should be made thoroughly familiar, by directing his attention closely to their details, and to their relation to other facts, until he sees each in all its aspects and understands its full significance.

§ 180. Training of the Witness: To Make him Comprehend the Relation between the Issue and the Facts to which he Testifies.

The bearing of these facts upon the issue should now be explained to him, and he should be made to see how one form of answer to a question may promote, and a different form might prejudice, the cause. He should be taught the relations of each item of his knowledge to the controverted point, and be shown the danger of uncertainty or untruthfulness in any of his replies. With a dull witness both this task and the preceding one are very difficult, and require more patience than some advocates possess. But the desired result can be accomplished by perseverance and encouragement, and after all it is but another form of the labor that must be expended on the slow-witted juror, who must be made in the same manner to recognize the relations between fact and issue, and the consequences to which the testimony of this witness leads. No time or skill invested in the cause pays better in the end than this. It changes the entire position of the witness before the court. It makes him an active worker in the case, when he is otherwise but passive. It clothes him with a conscious power to labor for the success of the cause, and gives him a courage and independence which, as the mere repository of information, he could never have obtained. The advocate who can put before the jury an array of witnesses thoroughly cognizant of the facts they are to narrate, and of the effect of each fact on the issue, must have a poor and most unworthy cause if, in addition to such evidence, it requires much of his personal effort to achieve a triumph.

§ 181. Training of the Witness: To Cultivate his Appearance and Manners.

The appearance and manner of a witness, if in any respect objectionable, are also susceptible of much improvement by

a little careful discipline. Between the barber, the bath-tub, and the clothing store, any sober man can be made presentable ; and female witnesses must be lost indeed if, when the means are put at their disposal, they fail to appear neat and respectable in a public court-room. The same pains may be sometimes profitably expended on a client, especially on the defendant in a criminal cause, who should never be permitted to appear before his triers until he has been made as prepossessing in appearance as the circumstances will permit. Faults of the witness in utterance and manner, forwardness, flippancy, timidity, hesitation or rapidity in speech, a low or mumbling voice, must be pointed out to him, and the importance of improvement duly urged upon him by explaining the reasons of their ill effect upon the cause. If he is willing to reform, practice and drill with the advocate or his assistant will render an essential service. He can be taught to speak slowly, modestly, and audibly ; to restrain his natural impetuosity ; to forego his disposition to assert himself out of regard to the importance of the cause ; to lay aside his dread and nervousness in order simply to narrate what he saw or heard. Rarely, however, is the fruit of such a discipline permanent. The faults corrected are the faults of disposition reflected in the manners, and though they may be temporarily removed by earnest self-control, yet when the restraint is over the reaction follows and the faults return. Hence the advocate should never cease his training of the witness until the testimony has been received, or if cessation does occur, the discipline should be renewed before the trial, and the witness be thenceforward held in check till it is ended.

§ 182. Training of the Witness: To Familiarize him with Court Proceedings.

Familiarity with the court-room is of course easy to acquire. Male witnesses can be sent there to remain as

spectators of other causes until they become thoroughly at home, and are accustomed to the methods of the judges, the warfare of the advocates, and the general rules of court decorum. Female witnesses, so far as practicable, should be subjected to the same preparation, but when impracticable they may all be gathered in the court-room at the opening of the cause, and by attentive watchfulness will learn in a few hours enough to render their position on the witness-stand tolerably secure. The practice of secluding lady witnesses in some quiet anteroom, until the time for their examination comes, is not only a mistaken kindness to the witnesses themselves, but deprives the cause of that support which their collective presence in the court-room on its behalf affords the advocate; while their own testimony is far less likely to be positive and clear, than if they had become accustomed to their surroundings, and had listened to the other witnesses.

§ 183. Training of the Witness: To Endure Cross-Examination.

The preparation of the witness for his cross-examination is aided by every form of discipline to which he is subjected. There are, however, two which are properly confined to this specific object. The witness must be warned that the exterior ferocity of his future adversary will be apparent only, and that his smiling friendliness is far more to be dreaded than his snarl. If not of ready wit, he must be taught to watch the questions narrowly, to reply cautiously and in as brief and apt a sentence as is possible, to beware of committing himself on any point as to which he is not entirely sure, and never to attempt to explain or reconcile any asserted or suspected inconsistency in his evidence until requested to do so by his own counsel. In order to accustom him to follow this advice, the advocate must afford him opportunities to practice it by cross-examining

him upon the evidence he is to give, and subjecting him to as severe a trial as he is likely to encounter in the court. By these methods even a dull and timid witness may be brought into a state of combined callousness and caution which will strip his cross-examination of its dangers. A quick-witted and courageous witness needs a different preparation. He is not deceived by either frowns or smiles, and the principal effect upon him of the examination, to which he is subjected, is to foment in him a desire to have an equal hand in the forensic duel. For this purpose he should be provided with the proper weapons. So far as the questions of the adversary can be foreseen or conjectured, his answers to them should be selected with a view to give the most effectual aid to his own side of the cause, and as far as possible to destroy the enemy. Important matters, which cannot be in any other manner introduced, may thus be brought to the attention of the jury, to the confusion of the questioner and the advantage of the cause; and if the witness be exceptionally able, this preparation may extend so far as to include a plan of answers which shall lead the adversary into questions that will open evidence otherwise inadmissible, and result in disclosures of the most damaging and even fatal character.

§ 184. Training of the Witness: To Control his Irritable Temper.

When a witness is of irritable temper, no preparation will avail to overcome it. He may be cautioned to restrain himself and will promise so to do, but in all probability the first provocation will destroy his self-command, and he will manifest his anger in the readiest mode that is presented to him. The duty of the advocate is to provide him with such easy and effective methods of explosion, and thus direct in his own favor the wrath which he cannot hope to quench. Facts concerning the opposite party and derogatory to his character or his cause, or matters relating to the cross-examiner

himself, may thus be recalled to his mind, to be employed by him in quick retaliation for the insults to which he deems himself subjected, — serving the double purpose of keeping his temper down by giving it a safety valve for its escape, and of creating ideas in the jury to which no direct testimony could ever be admitted. A dangerous witness may in this manner be changed into a highly useful one, and be supplied with weapons by which in most cases he can speedily silence, if not overcome, his foe, and win at once the sympathy of the jury and the forbearance of the court.

§ 185. Training of the Witness : To Make him Cautious and Considerate.

Caution and consideration are also attributes which no training will be sufficient to bestow. The exterior appearance of these qualities may be temporarily assumed, and may serve highly useful purposes, but the interior disposition cannot be easily acquired. Though the tongue be silent and the brow wrinkled with the lines of thought, the half-considered answer is in the mind before the question is completed, and will be ultimately stated in the same imperfect form. To inculcate caution, to warn the witness to attend closely to the questions and be sure he understands them before he undertakes the answers, is of course the part of every advocate ; but in the first heat of examination these admonitions are forgotten, and the impetuous disposition again disturbs the action of his mind. With all the discipline which the advocate can give to such a witness, he will still remain a danger and a difficulty, to be most strenuously watched and guided during the reception of his evidence.

§ 186. Training of the Witness : To Render him Truthful.

The untruthful witness, inaccurate as he may be in his ideas and expressions, is capable of profitable training. The

advocate who listens to his story will easily perceive the peculiar exaggerations to which he is subject, and can determine whether it be the fault of his imagination, or only of his words. An error of this character in his imagination may be removed by compelling him to measure his ideas by known external standards. Extravagant ideas concerning time or distance or momentum may be corrected by repeated experiments, in which the power to estimate those attributes of things is cultivated. The like is true of value, speed, sound, weight, illumination, temperature, of the expression of the human countenance, of the identity of persons, objects, and handwriting ; in fine, of all those matters wherein the fact to which the witness testifies is necessarily a conclusion of his own from other facts that he does not relate. All of these particulars the witness can be taught, in a short time, to measure with sufficient accuracy to enable him to state facts as they really were, and to avoid alike the exposure of his own absurdity on cross-examination, and a contradiction by witnesses whose memories and judgments are more accurate than his. Extravagant language is a habit of expression, generally consisting in a careless and unwarrantable use of adjectives, sometimes of nouns and verbs. It is a fault of which the witness is himself usually unconscious, and frequently exists in impetuous and demonstrative individuals. It is to be remedied, like any other fault in speech, by self-watchfulness and the correction of a kindly friend. The advocate should never suffer the witness to employ such language in their private interviews. He should require him to narrate his facts in proper words, correct every tendency to overstate or understate a circumstance, and compel him then and there to restate it as he ought. The particular faults of this kind in any individual are few, and can generally be overcome with patience and courage, as indeed they must be before the witness ought to be trusted in hostile hands.

§ 187. Training of the Witness: A Difficult and Tedium Task.

The proper training of a witness demands on the part of the advocate the highest skill and the most scrupulous honesty; skill, by which he detects the faults to be remedied and devises methods to correct them; honesty, which prevents him from employing this necessary discipline in such a manner as to make the witness the vehicle of falsehood and injustice. No exigency of his cause can justify the slightest deviation from the truth, and no interest in his client can excuse any act or influence of his whereby the witness, however willing, is induced to represent the facts otherwise than as he himself perceives them. It may be true that certain advocates abuse these opportunities, and train their witnesses to state, perhaps even to believe, matters which have no existence outside their perverted memories or lying tongues. This constitutes no reason why the honest lawyer should not sedulously improve his corresponding privilege, however carefully he avoids following their example.

§ 188. Training of the Witness: Renders the Production of Evidence Easier and More Certain.

The training of the witnesses has another use besides the preparation of the witness for the court. It relieves the advocate from the gravest difficulty which he ever encounters,—the production of his facts to the jury by eliciting them from unfamiliar witnesses. The extraction of testimony from untrained witnesses is a most dangerous and laborious operation. Although the advocate may have a general idea of the facts which are within their knowledge, and from their personal appearance may form some opinion of the proper method of approaching them, yet to obtain these facts in their true character, and without risk to other portions of his cause, severely taxes the most competent examiners. The

witness and the counsel in such cases have never met on common ground. Neither can understand the mental habits of the other, nor comprehend the meaning he attaches to his words. The advocate can ascertain how to approach the witness only from his general appearance or from information often wholly unreliable. The witness has not learned to trust the advocate, and labors under the constant fear of being led into a false position, or of disclosing that which he is not desired to tell. Though both may have precisely the same end in view, this strangeness to each other breeds a species of antagonism between them, manifesting itself in mutual misunderstandings and corrections, by which the value of the testimony is destroyed and the advocate himself discomfited. Even when the witness is his own client, from whom he has received the knowledge which he now seeks to produce before the jury, the chances are that without thorough training the witness and the advocate will soon be at cross-purposes, the former answering anything but the real questions of the latter, the latter chiding and discrediting the very person whose cause he is endeavoring to uphold. There are few advocates whom inevitable circumstances have not, at one time or another, placed in this position, and none who have experienced it will underrate the importance of a personal training of the witnesses, and of the consequent correspondence between the movements of his mind and theirs.

§ 189. Training of the Witness: Relieves the Advocate of much Perplexity during the Trial.

Moreover, a careful preparation of the witnesses vastly increases the power and energy of the advocate himself. Upon the trial of the cause he will require all the sagacity, penetration, and sound judgment with which nature and his education have endowed him. For the full exercise of faculties like these his mind must be free from anxiety, and his temper must be undisturbed. But if his witnesses are un-

known to him, if their statements are indefinite and ill expressed, if they are awkward and unprepossessing, if they are ignorant of courts and constantly involved in conflict with the judge and counsel, if they are angry or frightened or extravagant, the advocate cannot remain calm and placid, and preserve his intellectual clearness and acumen unobscured. In such a situation the advocate sustains an absolute and appreciable loss of power. He may survive it, and his cause may triumph. But it is a hazard which he has no right to incur, and a self-depreciation which his own interests should forbid him to permit. The sense of personal comfort and of mastery over his case which is engendered by the foreknowledge of what the evidence of every witness is to be, and that he will acquit himself in a manner favorable to those who call him, is worth all the trouble that the most extended and laborious preparation may demand.

CHAPTER IX.

OF THE DIRECT EXAMINATION OF WITNESSES.

**§ 190. Production of Evidence Must be Governed by
Oratorical Rules : Evidence Must be Intelligible,
Convincing, and Persuasive.**

The production of the evidence in court, like every other oratorical act, should possess the three characteristics of adaptation to the hearers, of constant progress toward the end desired, and of vivacity and force in its presentation of ideas. The facts narrated by the witnesses should be brought entirely within the comprehension of the jury. They should be so arranged as first to conciliate, then to convince, and finally to persuade. They should be exhibited in so many different aspects, and expressed in such variety of language, as to enchain attention and render their impression intense and vivid in the highest possible degree. Thus, in its sphere, the examination of the witnesses in court will follow the same rules, and will attain the same result, as the oration of the advocate himself.

**§ 191. All Evidence, except that of Experts, Naturally
Intelligible : Production of Expert Evidence.**

With the exception of expert and scientific evidence, all testimony is in its own nature usually intelligible. This class of evidence relates to facts which in themselves are difficult to understand, and whose relations to other facts are unknown to the jury and cannot easily and briefly be explained. It is too often presented through witnesses whose self-conceit and pedantry raise an additional barrier between its hearers and the knowledge which they would acquire ; and in such

cases the endeavors of an advocate, whose comprehension of the subject scarcely exceeds that of the jury, to simplify and humanize the technical narrations of the witness alone are needed to render the confusion hopelessly inextricable. If evidence of this class is to be of any service, it must, of course, be fully understood. It is the duty of the witness to lay aside his scientific terminology, and employ such expressions as are comprehended by all common men; and when he will not or cannot do this, he should, if possible, be at once rejected by the advocate and another substituted in his place. The circumstances of the case, however, sometimes permit of no selection, as where physicians who attended the deceased, or participated in an autopsy, are called to testify to facts which they observed. If none of these is capable of conveying his ideas in ordinary words, the advocate must by his own efforts supply the deficiency. So far as practicable he should confine the witness to explanations and assertions of a general and substantial character. The unintelligible statements of the witness, translated into familiar language, should be embodied in the questions of the advocate and categorically answered, until, by dint of persevering inquiry, the essential evidence is brought within the comprehension of the jury. To understand the subject of such evidence, so far at least as it is related to the cause, is therefore incumbent on the advocate. A lawyer who cannot stand between a scientific witness and the jury, and interpret by his questions the technical expressions of the witness, is not competent to conduct such an examination. The study of these subjects consequently becomes part of the necessary preparation of his cause, a fraction of that training which the advocate receives while in the act of disciplining others, and must be pursued in books or among experts until the desired facility is gained. When time and opportunity for this are wanting, he must be aided in the court-room, during the examination of the wit-

ness, by competent assistants whose understanding of this aspect of the case enables them to suggest such inquiries to him as, being answered, will secure the comprehension of the evidence.

§ 192. Intelligible Evidence: how Rendered Unintelligible: the Rambling Witness: his Treatment.

Testimony in itself intelligible is often rendered difficult of comprehension by the incompleteness, or the want of continuity, with which it is presented. These evils are due either to the defective mental constitution of the witness, or to his moral weakness, or to his personal hostility, or to the improper conduct of the advocate. A defective mental constitution manifests itself in rambling, or in dull and stupid witnesses. In many individuals there apparently exists no power of fixing the attention on a single object and persistently pursuing its consideration, and from such an individual it is useless to expect any exhaustive and coherent statement of the facts within his knowledge. Any idea which suddenly arises in his mind, during the course of his narration, diverts his thought into another channel; he loses sight of many details which he should remember, and continues his relation without consciousness of the omission. If he endeavors to express this new idea, his effort to explain it leads him still further from his proper subject, and when he returns to it, if ever, it is at a point different from that at which it was abandoned, while the intermediate ideas, however necessary to the comprehension of the whole, are left unuttered. The examination of a witness of this defective mental character should be close and catechetical. The questions of the advocate should lead him step by step through the entire subject of his testimony, in logical order and without omissions. If he persists in rambling and irrelevant replies, he should not be rudely interrupted, for any mental shock or moral perturbation will increase his difficulties, but when he has finished

what he wishes to relate, the question from whose true reply he has departed should be patiently repeated, and the examination pass from this point to the next only when the proper answer is obtained.

§ 193. Intelligible Evidence: how Rendered Unintelligible: the Dull and Stupid Witness: his Treatment.

The same obstacles are encountered in eliciting the evidence of a dull and stupid witness. His perceptions are cloudy and indefinite. His processes of recollection and reflection are slow and disconnected. He does not comprehend the questions of the advocate, or the pertinency and significance of his own replies. Impelled to answer by the conviction that he ought to know everything which the interrogatory assumes that he is able to relate, he ventures a response without considering its relevancy to the question or its effect upon the cause; and when requested to explain the inconsistencies or the obscurities of his narration, he increases rather than removes the difficulty by new and even less harmonious assertions. The value of this witness to the cause depends almost entirely on his management by the examiner. As he is generally honest and willing to impart his information, it is only necessary to make him understand what is desired of him, and to afford him proper methods of communicating his ideas. The questions of the advocate must be brought within his comprehension. They must be short, direct, deliberately uttered, and call for the expression of but a single thought. They must be couched in language to which the witness is accustomed, following even his mispronunciations and erroneous use of words, in order to suggest to him the exact thought which he is to express. If one question is found insufficient to fix his attention on the subject, another and another must be asked, approaching it from different directions and pursuing it through different

lines of associated ideas. The patience of the advocate in this examination must be inexhaustible. To take the witness again and again over his story in order to recall to him some event or fact which seems to elude every effort of his memory, to construct questions which contain some word or phrase suggestive of the missing thought, to contrive methods of explanation or illustration which enable him to make himself clearly understood by the jury, to afford him opportunities for reconciling inconsistencies into which his misapprehension of the questions or the inaccuracy of his replies has led him, taxes the ingenuity and perseverance of the most adroit and indefatigable lawyers. The task imposed upon them is nothing less than the creation of the testimony, save that the facts, as crude and indefinite ideas, lie dormant in the recollection of the witness. It is the advocate who gives to these ideas vitality and form, who clothes them in suitable expressions, who arranges, produces, and communicates them to the jury.

§ 194. Intelligible Evidence: how Rendered Unintelligible: the Timid and Self-Conscious Witness: his Treatment.

The testimony of a witness whose moral weakness manifests itself in an undue timidity and self-consciousness is subject to the same defects. His attention is divided between the ideas which he is requested to present, and the effect that he supposes is to be produced by their disclosure on himself or on the cause. His apprehensions and conjectures often work through his imagination on his memory, until without intending falsehood he omits or colors facts to a degree irreconcilable with truth. No sooner are his ideas uttered, however, than he becomes conscious of their error. If he now attempts an explanation, it usually results in his entire discomfiture. If he persists in the misrepresentation or concealment, a new cause of embarrassment arises

in the fear of subsequent exposure, and leads to still more harmful falsehoods and suppressions. Thus, with the best intentions at the outset, and knowing matters of importance to the cause, a nervous, apprehensive witness may finally retire suspected of the grossest perjury, and without having related a single matter as it actually occurred. No witness who is liable to this infirmity should be permitted to narrate material facts until his embarrassment and fear are overcome. By simple questions in reference to his occupation, residence, or relation to the parties or the cause, eliciting replies in which mistake will be impossible, he should be gradually assured that he is capable of understanding, and of properly responding to, the inquiries which are to be proposed to him, and his entire attention fixed on the proceeding in which he is now engaged. When at last fully at his ease, the more material portions of his evidence should be approached, the questions made, if possible, even more simple and direct, and limiting the answer to the point required. At the least indication of returning discomposure the examination of important matters should be at once suspended, and the witness occupied with insignificant ideas until his self-command has been restored. The slightest manifestation of impatience or vexation toward such a witness must be avoided. He does not need to be reminded of his inefficiency. On the contrary, his chief necessity is to forget it, to concentrate his thoughts upon the facts to which he testifies, and to speak as earnestly and accurately concerning them as he would do in any other situation where self-consciousness did not embarrass and confuse him. The same witness who, if regarded by his questioner with an incredulous stare and knitted brow, stumbles, forgets, and contradicts himself, will often, when encouraged by an interested gaze and kindly smile, and guided by perspicuous and respectful inquiries, relate whatever he may know with an assurance and directness not less amazing to the witness than it is gratifying to the advocate.

§ 195. Intelligible Evidence: how Rendered Unintelligible: the Bold and Zealous Witness: his Treatment.

The moral weakness of a bold and zealous witness creates almost equal difficulties. He also is self-conscious, but in him self-consciousness is manifested by a high opinion of his discernment of the real requirements of the cause, and of the importance and conclusiveness of his own evidence concerning it. He feels that, if permitted to state fully, in his own way, what he thinks as well as what he knows, the jury must at once decide in favor of the party in whose interest he is called. He rebels at interference, even of his own counsel, is jealous of the questions in reply to which his testimony is delivered, and avails himself of every opportunity to assert his own opinions and escape the limits within which the interrogatories are intended to confine him. He is a dangerous witness, rarely adhering strictly to the truth, easily led astray by flattery, and liable to betray the cause whenever he suspects that his services are unappreciated. This witness requires the most prudent and at the same time the most inflexible control. While he should not be irritated by sensible restrictions, he must still be kept within the narrowest limits, and his evidence confined in matter and expression to the precise truth which it is necessary for him to disclose. This suppression, though inevitable, must take upon itself the appearance of encouragement; and the very questions by which the advocate endeavors to restrain him must seem to him new impulses toward the divulgence of his valuable knowledge. The manner of the advocate toward him should, therefore, be respectful, dignified, and ceremonious; the questions should necessitate short and simple answers; and his replies be checked by a new question the instant that the true answer of the former is complete. The entire examination of this witness should be conducted with a view to the dangers which will attend his cross-examination. Exagger-

ations in his evidence, which are likely then to be exposed, should be corrected as soon as made, by questions bringing him to some known standard and furnishing a measure of his actual meaning. If he endeavors to conceal unfavorable facts which are certain some time to appear, such inquiries should be propounded as will now elicit them in the least unfavorable form. While he is held with curb and check to prevent such manifestations of excessive zeal as will convince the jury that his interest is greater than his love of truth, he must be also forced to disclose matters which, though lessening the present value of his evidence, would utterly destroy it if revealed for the first time upon his cross-examination.

§ 196. Intelligible Evidence: how Rendered Unintelligible: the Hostile Witness: his Treatment.

Incompleteness or obscurity in the testimony of a hostile witness is caused by difficulties of an entirely different character. The obstacles encountered in the examination of the rambling, the self-conscious, or the stupid witness arise from intellectual or emotional defects, and can be overcome by enlightening the mind of the witness, or by assisting him to bring his impulses under control. The obstacle encountered in an adverse witness, however, is an antagonistic will. He labors usually under no mental or emotional embarrassments. He knows clearly and precisely the facts which ought to form his evidence. He is able to narrate them positively and coherently, if he so chooses. But, actuated by interest, or partiality, or more secret impulses, he is determined to withhold the knowledge he possesses, or, if compelled to yield it, to communicate it in language which will make it as valueless as possible. Where such a witness is the sole repository of ideas which are essential to the cause, the advocate has no other course than to produce him, and render him as useful as he may. Otherwise, he should avoid him altogether. For it is seldom that the ben-

efit to be derived from such a witness is equal to the injury which his reluctance to assist and his perversion of the facts inflict. When, however, it becomes necessary to improve him, the advocate must first discover the cause and character of his hostility. If it be partial only, manifesting itself toward a single person or a single feature of the cause, it may be possible during the whole examination to ignore the objectionable individuals or issues, and to approach the witness solely upon matter concerning which he will freely testify. If his antagonism extend to the entire cause, or to all the parties by whom he is called, there is little hope of rendering him useful unless he can be either conciliated, circumvented, or subdued. In order to conciliate him, the weak points in his disposition must be ascertained, and siege laid to his heart by questions which appeal directly to these vulnerable characteristics. Once in a good humor with himself and with the advocate, his motive for concealment or perversion of the truth exercises less influence upon his mind, and he replies with little hesitation to cautious inquiries which do not directly touch his prejudices, or present anew to him the exciting cause of his antagonism. Upon the failure of this method of attack, the advocate should have recourse to the second, and attempt to circumvent him. Remembering that every fact is so associated with other facts that its existence necessitates or inevitably follows theirs, he begins with questions concerning matters not apparently connected with the fact desired, yet so related to it that one presupposes the occurrence of the other, and gradually approaches it, pausing, however, before the witness sees the drift of the examination and is put upon his guard. Then he inauguates another line of inquiry, leading from a different point but in the same direction, and then another and another, until he has established around the central fact a chain of assertions and admissions which lead to it so irresistibly that the witness must concede it or repudiate his former statements. If

the acumen of the witness, or the paucity of associated facts, render this method of attack impossible, the sole remaining hope is in his subjugation. Now he is to be treated as an open enemy. As soon as possible the advocate provokes some manifestation of his hostility in order to obtain the right to cross-examine him, and then with vigor and severity rains down upon him an incessant fire of rapid and incisive leading questions, until he either answers, or by his refusal to reply impresses on the jury the conviction that the statement he withholds is true.

§ 197. Intelligible Evidence: how Rendered Unintelligible: Ignorance of the Advocate Concerning the Cause.

Those difficulties in rendering testimony perfect and intelligible which arise from these defects in the character and dispositions of the witnesses are perhaps never wholly overcome. Even the most skilful advocates are often compelled to admit their defeat, and the direct examination of the witnesses has thus come to be regarded as the highest test of professional ability. But the difficulties which the advocate himself creates are, on the other hand, avoidable. They result either from his failure to prepare his case, or from his thoughtless and impetuous behavior, or from his ignorance or disregard of common rules of oratory. It cannot be expected that, while the facts pertaining to his cause are still unknown to him, an advocate can conduct a witness to their full and logical relation. Rather his interference tends to worse confusion. It puzzles and distracts the witness, excites his apprehensions of mistake or falsehood, renders his memory more treacherous and his judgment less profound. When this emergency arises, as it sometimes may where the sudden substitution of one counsel for another becomes necessary, the wisdom of the advocate is best evinced by silence. Until familiar with the facts, the aid he

can afford the witnesses is very slight, and he should suffer them to state, uninterrupted, what they have to say, supplying known omissions and correcting known mistakes after the voluntary narrative has ceased.

§ 198. Intelligible Evidence: how Rendered Unintelligible: Thoughtlessness and Impetuosity of the Advocate.

The thoughtless and impetuous advocate defeats the purposes of evidence in an equally effectual manner. He is convinced that nothing can be well done unless he does it, that no witness can relate a fact unless aided by his inquiries, and that no story can be completed unless he secures the insertion of each minute particular in its proper place, whenever that place in the narration is attained. He constantly interrupts the witnesses to emphasize some special point, or to call attention to some fact which he assumes the witness has forgotten. He asks misleading questions by which the witness is perplexed, and when the answer is not prompt and pertinent rebukes him in a manner that puts to flight all his remaining recollections. If an answer is of doubtful import, instead of making a different inquiry which may produce a more complete reply, he repeats the doubtful answer to the witness and demands an explanation,—a demand with which the witness, having forgotten what he did say or having spoken without full consideration of his words, is naturally unable to comply. He cross-examines his own witnesses as if he doubted their integrity or the exact truthfulness of their perceptions, not seldom leading them to qualify their former statements and neutralize the force of their assertions. The testimony of the best of witnesses cannot survive such maltreatment as this. If they do not resent the imputation of weakness or dishonesty which this meddlesome examiner thus casts upon them, they soon become confused beyond all hope of restoration, or so disgusted with his

methods as to lose interest in the cause and leave it to destruction in his hands. The advocate who does not command himself cannot command his witnesses, and has no right to expect from them that effective testimony which under better guidance they would certainly be able to disclose.

§ 199. Intelligible Evidence: how Rendered Unintelligible: Failure of the Advocate to Observe Oratorical Methods in Presenting Evidence.

The advocate, who disregards or is unacquainted with the oratorical rules which govern the production of evidence, is certain to present his testimony in a most imperfect manner. The comprehensibility of evidence depends not only on the ability and willingness of witnesses to communicate the ideas which they possess, but on the order and connection in which those ideas may be introduced. Although every lawyer knows that facts must be presented in a certain sequence if they are to be fully and immediately understood, yet in practice few matters are left so largely to the control of accident and chance as this. Witnesses are produced as their convenience or the whim of counsel or of client may direct, and when produced they are examined without reference to the association of events, but as the unpremeditated fancies of the advocate suggest. This practice is, however, contrary to the idea which underlies, and to the purpose which should animate, the exhibition of the evidence in court. Witnesses should be called in such an order as the interests of the cause require. Their testimony should be given in such a manner as to exhibit in the clearest light the facts on which the cause itself is based, and no common exigency should be permitted by the advocate to deprive him of the advantage of introducing evidence in the most favorable and convincing method. For mismanagement in this respect there can be no apology. If it results from the

inherent and unalterable mental constitution of the advocate, he has mistaken his vocation, and in justice to his clients he should leave this field of professional effort to men better fitted for their duties. If it is due to want of proper education, or to contempt for those established rules which govern the production of the evidence in court, the method of avoiding such misconduct in the future is apparent, though the past may be forever unatoned. But if, as is often the case with the well trained advocate, it arises from the unwarranted assumption that facts clear and simple to himself will appear equally so to every other person, in whatever manner they may be presented, it betrays a carelessness and want of foresight of which no lawyer can afford to be found guilty. The complaint, now so prevalent and apparently so well deserved, that juries often fail to grasp the merits of a case, surprises no one who has been accustomed to study court proceedings except as to the persons to whom the fault is usually imputed.

§ 200. **Intelligible Evidence : to be Presented in Chronological Order.**

Facts make their strongest impression upon the mind when narrated in their chronological order. The most natural and most pleasing review of past events is that which moves forward from the cause to the effect, from the acts and conditions of one period to the acts and conditions immediately succeeding. Whether in history, or science, or philosophy, whether in the fables which amuse the infant or the theories which puzzle and delight the sage, the spontaneous course of man is from the beginning toward the end, as though this were the only method in which the subject could be fully understood, and the knowledge gained by studying it truly and permanently appropriated. This law of nature would itself suggest to the advocate the proper mode of presenting facts to the

consideration of his hearers, and the slightest realization of the attitude of a jury toward the fact at issue strongly supports and emphasizes it. There is no audience to whom a simple, natural, chronological order of narration is more necessary. They are wholly ignorant of the facts in issue, and anxiously wait for their disclosure. They derive all their knowledge from the oral statements of the witnesses, and rely solely on their memories to retain the matters on which, by and by, they are to base their judgment. They have no method of refreshing their recollections, or opportunity to revise, collect, and compare facts with one another. Surely there can be no greater folly than to offer to such a body of men a disconnected and chaotic aggregation of events, and expect them to so arrange and classify them that from them they can draw reliable conclusions.

§ 201. Convincing and Persuasive Evidence : Attention and Interest to be Aroused by the Opening Evidence.

Second only to the necessity of adapting the evidence to the comprehension of the jury, is that of offering the evidence in such a manner that it will move their minds and dispositions unceasingly toward the judgment which the advocate desires. In accomplishing this purpose, it should be his first endeavor to secure attention and excite good will toward his client and his cause, either by the character of the opening evidence itself, or by the witness through whom such evidence is given. When the client is a prepossessing personage, it is wise to make him the first witness, even although his testimony may be brief and unimportant. The jury thus make his acquaintance at the outset, their sympathies are naturally enlisted for him, their curiosity as to the cause becomes a living interest in the client, and they are predisposed to listen to whatever may support or illustrate his claims. When the client is unable thus to serve

his cause, his evidence may still be of sufficient moment to arouse their attention and insure their favor; but if it is not, the advocate should commence his testimony with some other witness whose personal appearance, or whose narrative of facts, will win the favor which he here requires.

§ 202. Convincing and Persuasive Evidence: Importance of Opening Evidence.

The importance of this first impression on the jury cannot be overestimated. Whether it be favorable or unfavorable it is never totally effaced, whatever evidence may afterwards be introduced. Unconsciously to themselves the individual jury-men espouse at once one side or the other of the cause, and all their subsequent impressions are colored by the prejudices which are then engendered. The advocate who calls at this point a bungling or suspicious witness, or offers evidence commended neither by the person who delivers it nor by its own intrinsic worth, excites a hostility toward his cause against which he must struggle during all his future labors. And inasmuch as cases never occur in which no prepossessing witness to any admissible fact can be procured, it is the folly or the ignorance of the advocate alone, if by his neglect to open with such a witness this difficulty is created.

§ 203. Convincing and Persuasive Evidence: Evidence Covering the Entire Case next to be Presented.

To place the jury in immediate possession of all the essential facts on which his cause is based, should be the next endeavor of the advocate. If his first effort was successful, the jury are now impatient to arrive at a full understanding of the case. Their interest is excited, their sympathy is keen, and they are solicitous to know whether the facts will warrant the impressions which they have received. To take advantage of this favorable temper, before its fresh exuberance

expires, the advocate must hasten to spread these facts before them through the evidence. The witness who can do this most completely and effectively should, therefore, next be introduced, and, if his narrative does not cover the entire transaction, others should be examined in regard to what remains. This rule is as imperative in cases where an opening statement has been made, as in those in which it is omitted. No jury can receive that statement as conclusive evidence of the matters it recites, nor is its effect upon their memory or their understanding, however powerful, to be compared with that of the sworn testimony of respectable and intelligent witnesses. Unless speedily corroborated by such testimony it is generally either doubted or forgotten, and it is best confirmed by evidence in which the facts appear in the same order in which they were stated. The first substantial witnesses offered should thus repeat and maintain the propositions of the advocate, and fix them in the minds and recollections of the jury beyond the danger of obliteration.

§ 204. Convincing and Persuasive Evidence: Most Effective Order of Presenting Evidence.

Where there are many witnesses, of whom some are acquainted with the whole transaction while others know but one or two of the included facts, the same method should be substantially pursued. The witnesses who are to testify to all the facts should be divided. So many being called as may be requisite to put the case as a whole before the jury, the witnesses to separate details should be introduced, and the testimony close with the remaining witnesses, whose statement covers the entire ground once more. In this manner the completeness and harmony of the narrative is preserved, unaffected by the intermediate evidence which, if given first, would not be understood; if last, would have disturbed the sharpness of the impressions left upon the mind of the jury as to the transaction as a whole; and, if

scattered through the other evidence, would have wearied and distracted the attention of the jury, and perhaps have rendered the entire testimony pointless and confused. When several series of facts converge toward one central event in the cause, such as the separate preparations of co-conspirators for the commission of a crime, each series should be treated as a distinct transaction ; and when the evidence concerning it has been commenced, it should be completed before proceeding to another. If various series of facts diverge from one event, the same mode of dealing with the evidence concerning each should be observed. This matter presents no difficulty when the rules of practice permit a witness to be examined as to one part of the cause, and afterward recalled as to another. But when the rules require the knowledge of a witness to be exhausted in one continuous examination, the necessary clearness and distinctness of the evidence cannot be easily attained. The most effective method is to call, next after the witnesses who are examined for the purpose of presenting the whole case to the jury, the witnesses whose evidence will be confined to the particular lines of fact, preserving them in distinct classes ; and when these are finished, to proceed with those whose testimony will include not only the preparatory series of facts, but the great facts in which they finally converge.

§ 205. Convincing and Persuasive Evidence: Effectiveness how far Dependent on the Qualities of the Witnesses.

The persuasiveness as well as the convincing and explicatory power of evidence, depends upon the qualities, the number, and the order of succession of the witnesses. A good witness — one whose statements are definite and positive, whose mind is clear, and whose manner is agreeable — does more than to excite belief ; he stimulates affections and awakens purposes. The listening jury are not merely satis-

fied that what he says is true ; they are impelled to act on their convictions, and to carry truth to its legitimate result. The witness need display no special interest in the cause, need use no language to excite emotion, nor introduce into his narrative pathetic coloring ; the simple power of truth, firmly, clearly, and agreeably presented, is sufficient to awaken the impulse of the human heart and move the human will. There are few advocates who have grown gray in service at the bar that have not realized this power ; and, listening to the story of such witnesses upon the other side, have not felt the foundations of their own cause crumbling underneath their feet, and, partisans as they were, become convinced and persuaded, for the time, that they and their clients were alike in error.

§ 206. Convincing and Persuasive Evidence : Effectiveness Impaired by Poor Witness.

To the employment of such witnesses as these the advocate should, as far as possible, confine himself. The mere fact that a single individual only is possessed of knowledge which is serviceable to the cause may justify his presentation to the jury, although his manner and appearance are unfavorable ; but there is no excuse for counteracting the effect produced through prompt and pleasing testimony by calling weak and disagreeable witnesses to the same point. No number of such witnesses can add to the impression which a positive and prepossessing witness has created. The danger is, that, in the multitude of unpleasant emotions excited by the former, the influence exerted by the latter may be dissipated, and the entire value of the evidence may be destroyed. In almost every instance, therefore, it is wiser to rest a fact upon the statement of one clear and agreeable witness, than to endeavor to corroborate his evidence by that of witnesses who make a poor impression.

§ 207. Convincing and Persuasive Evidence: Effectiveness Increased by Multiplying Good Witnesses.

On the other hand, where good witnesses are numerous, the advocate should not restrict himself to one, even although the point to which they testify cannot be controverted. The impression made upon the jury by the successive appearance of respectable and intelligent persons in support of a cause is very strong, whatever be the comparative importance of their testimony. The distinction never is so clearly drawn between a party and his witnesses that the jury do not, in some degree, regard them as jointly interested in the controversy; and clients often find this feeling resulting in their gain or in their loss. The character of an accused person is by law presumed to be good, and courts uniformly so instruct a jury; but no prisoner at the bar would fail to summon in support of this presumption, when it were possible, the honorable and influential men of his community, not to make certain what the law presumes, but for the moral force which the mere presence of such men on his behalf will exercise upon the jury. But when the evidence of such witnesses is in itself important, the reason for employing numbers becomes far more powerful. The minds and memories of no two witnesses are so precisely equivalent to one another, that each will narrate the same facts in the same manner and with the same expressions. The inevitable variety which will thus manifest itself in their evidence can be made of great service to the advocate. By means of it he can again and again repeat and deepen the impression made by the first witness, yet without wearying the attention of the jury. He can with more certainty reach the convictions and the impulses of all, differing as they do among themselves in their impressibility, than if depending on the evidence of a single individual. The same advantage which the orator obtains, by the employment of poetic images and verbal figures to give variety and intensity to his ideas, is gained

by placing facts before the jury through the evidence of many witnesses. Of course, to such a practice there is a limit which the good sense of the advocate must not permit him to transcend. The endurance of a jury is not infinite, even where they are excellently entertained, and when the advocate has examined witnesses enough to present his case in every aspect fully and conclusively, he should forbear, lest the patience of his hearers be exhausted and the evidence itself outlive its force.

§ 208. Convincing and Persuasive Evidence: Poor Witnesses, when Necessary, how Introduced.

If it becomes essential to introduce the testimony of undesirable witnesses, the time and order in which they should be presented must be determined by the same considerations. No witness of this character should be employed, either at the opening of the evidence or at its close. The impressions of the cause derived from the first witness are most powerful and permanent; those which are left behind him by the concluding witness are scarcely less so. When these extremes are strong and convincing, the intermediate testimony is of less importance. Its weakness is lost sight of in the general and broader view which, resting on the entire evidence, inevitably sees most clearly its beginning and its end. Poor witnesses, where indispensable, should therefore be dispersed among the good, in such a manner that their weaknesses may be concealed and overshadowed by the courage and energy of others who immediately succeed them. Effective witnesses can be produced at the commencement and the termination, and at frequent intervals during the course of the evidence, even although their statements may be unimportant, and thus give character and power to the whole testimony, as well as proof of facts to which they have been called. By this expedient the entire body of witnesses, though many of them may be so poor as

to be almost useless, may be made to appear strong and valuable, as in a solid phalanx the frail and cowardly are borne onward by the vigorous and brave.

§ 209. Convincing and Persuasive Evidence: Effectiveness Increased or Diminished by the Demeanor of the Advocate toward his Witnesses.

The appearance presented by a witness while before the court, and the opinion which the jury form concerning him, are governed in a great degree by the method of his treatment by the advocate. The value of the testimony of the best and strongest witnesses can be destroyed by the folly and the blindness of the counsel who examines them; the credibility and influence of the weakest and the most repulsive may be impregnably established under his prudent and vigilant control. The permanent impression made upon a jury by the evidence of any witness is the sum of the impressions they receive from his conduct and the conduct of his questioner; and their judgment as to his intelligence and honesty is formed, in a much larger measure than any one imagines, upon the apparent confidence and respect with which he is regarded by the advocate. It is alike the duty and the interest of the advocate to take advantage of this inestimable opportunity to intensify the influence which his good witnesses exert upon the jury, and to support and fortify the doubtful and the weak.

§ 210. Convincing and Persuasive Evidence: Demeanor of the Advocate toward a Good Witness.

Confidence in a strong and well trained witness is best manifested by letting him alone. After the necessary questions by which he is introduced, and brought down to the point where his real evidence begins, he should be suffered to relate it in his own way, free from interruption and from interrogatories, until his story is at an end. Any omissions

of which he may have been guilty can then be called to his attention and supplied, and any proper explanations of his statements may be required. A narrative like this makes the clearest and most powerful impression which evidence can produce upon a jury. Questions and interruptions, so far from aiding, only confuse and weaken it. It should be left to bear its own fruit, untouched by either grafting axe or pruning knife.

§ 211. Convincing and Persuasive Evidence: Demeanor of the Advocate toward a Poor Witness.

Over the witnesses of every other class the advocate must exercise a firm and continuous control. Whether their weakness manifests itself in boldness or timidity, in irascibility, untruthfulness, or in any other manner, the details of their evidence should be presented to the jury with the utmost caution, and in the form of answers to such questions as give the least possible opportunity for injurious replies. At the same time, save in the case of adverse witnesses, the utmost confidence in and respect for his witness must be manifested by the advocate. Not even the slightest trace of distrust or disappointment in him should be suffered to appear, and though he makes a statement in contradiction of the claims in whose support he has been called, the advocate should express in his entire conduct no doubt of his integrity or knowledge. Damaging as such a statement may be, it will be made still more so if the jury perceive either that the advocate realizes that he has been hardly hit, or if his manner toward the witness suggests to them that he has called a witness whose honesty and truthfulness he is now ready to impugn. If such a statement cannot be explained or modified by further questioning of the witness, the advocate has no other course but to pass it by unnoticed, and trust to the effect of other evidence to counteract or to conceal it. Whatever in the manner or appearance of the witness may

unfavorably impress the jury, the manner of the advocate should also be directed to antidote or cure. His language and his conduct should suggest to them his own belief that all faults in the witness are due to the embarrassments of his position, or to the misfortunes which surround his life. He should endeavor to enlist their sympathies for him in cases where they cannot but perceive his ignorance and moral degradation, and to impart to them his own conviction, that, in spite of all appearance to the contrary, the witness really intends to tell the truth, and knows the facts in whose expression he encounters so much difficulty. The opinion of the jury in regard to all such witnesses is what the advocate causes it to be. They take their cue from him, and, if they see him manifesting kindness and respect, they will experience the same emotions, and receive with confidence the evidence of one whom, if the advocate inspired them with a different feeling, they would unhesitatingly reject.

§ 212. Convincing and Persuasive Evidence: Effectiveness Aided or Impaired by the Demeanor of the Judge toward the Advocate.

Closely connected with the impression made upon the jury by the witnesses is the impression they receive from the conduct of the advocate and the relations which subsist between him and the court. A jury naturally regard the judge as their guide and teacher. Assured of his superior experience and wisdom, and recognizing him as set above them by the law to direct and govern their investigations, they look to him in every difficulty, and strive to follow what appears to be his judgment. With very few exceptions, the verdict of a jury corresponds with the ideas which they have formed concerning the opinion of the court, and these ideas they gather not merely from the charge, but from the demeanor of the judge toward the counsel and the witnesses during the entire trial of the cause. It becomes, therefore,

the duty of the advocate to impress the jury, from the outset, that the court is on his side, not by any rash and impudent assertions, but by comporting himself on all occasions in such a manner as to receive the favorable notice of the court, and be supported by it in all his interlocutory contests. Every request or motion that the court allows, every decision in his favor on an objection to the evidence, every suggestion which the court adopts, whether or not itself of any consequence, conveys to them an idea that the judge regards him as entitled to succeed, and consequently that his cause itself is just. There is no surer way to alienate a jury than to indulge in controversy with the court. On some great issue, involving fundamental human rights, it may be safe as well as necessary to treat as an antagonist a despotic and oppressive judge; but in all other cases the jury instinctively side with the court, and if the counsel be defeated, as when the court insists is sure to happen, it will impress them as the overthrow of some essential position of his cause, and shake their confidence in its righteousness and truth. To win the judge is generally to win the case. The advocate cannot expect to do the former, unless both facts and law are in his favor, but if he can appear to carry with him, during all the proceedings prior to the charge, the sympathies and approval of the court, he need rarely apprehend that the final instructions to them in the law will countervail the good effect which has resulted from hours, and perhaps days, of constant favor and support.

§ 213. Convincing and Persuasive Evidence: Effectiveness Aided or Impaired by the General Demeanor of the Advocate.

The advocate who would enlist the sympathies of the jury for himself, and through him for his cause, must appear worthy of their confidence and respect. They have assembled to perform a solemn duty, — no less than to express

the judgment of the law, the highest human judgment, upon the rights and duties of the parties to the cause. They have not come together to participate in an athletic contest, nor to be entertained with gladiatorial combats between two harmless but portentous foes. They have no natural sympathy with captiousness, and partisanship, and mutual recriminations. They have a right to look for, and hence they expect, in learned and experienced champions of the truth, a dignity, a courtesy, a candor, not irreconcilable with earnestness and vigilance, but utterly opposed to passion, artifice, and impudence. The jury will incline to follow him in whom they believe, and they will believe in him who seems to be most thoroughly convinced that he is in the right, and most devoted to the full and perfect presentation of the truth to them. The advocate must, therefore, appear anxious to afford them the widest opportunity to hear and judge of the real merits of the case, and to examine all the facts, whether they confirm or contradict his claims. He must avoid all trivial objections to the evidence, which though sustained seem like an effort at concealment, and if overruled create an apparent controversy between him and the court. He should defend against objections mildly, without temper and without exhibiting anxiety as to the ultimate ruling of the judge, treating the matter as of little moment lest, if the ruling be adverse, the jury deem the cause itself impugned. If his witnesses are interested in the cause, or otherwise are open to attack, he should anticipate the inevitable disclosures of the cross-examination by placing the defect before the jury in its least repulsive form. He must shun all appearance of leading or dictating to his witnesses, as well as every act or look which might suggest a secret understanding as to the nature of the evidence they are to give. His questions should be clear and simple, slowly and deliberately uttered, and time afforded to the witness to comprehend and fully answer them. No question

should be asked without an object, the danger of an unexpected and disastrous answer being even less than of impatience on the part of court and jury at the evident and wanton waste of time. Strife and contention with opposing advocates, an unaccommodating or suspicious manner, rudeness and anger toward adverse witnesses, petulant interference with the progress of the trial,—in fine, every act and word which betrays vexation, disappointment, or personal animosity, or is inconsistent with the supposed wisdom, courage, or honesty of counsel, weakens the influence of the advocate over the jury and renders them impervious to his most convincing and persuasive proof. If he presents himself before them, not to entertain or bore or bully them, but simply to assist them to arrive at truth and to perform their duty, and they so receive him, he may depend upon their confidence and sympathy, and, if his cause is well supported by the evidence, upon their verdict.

CHAPTER X.

OF THE CROSS-EXAMINATION OF WITNESSES.

§ 214. Cross-Examination: its Purpose.

The same ultimate purpose which controls the advocate during the production of his own evidence also controls his cross-examination of opposing witnesses. Their testimony, if of any value, has communicated certain ideas to the jury. It has created an impression favorable to the party by whom they were called. It has to some extent convinced them of the justice of his claims, perhaps persuaded them to vindicate him by their verdict. It is the object of the cross-examination to obliterate these impressions, to undermine the foundations on which the convictions of the jury have been based, to change their confidence in the testimony of these witnesses into distrust, and their good will toward the adversary into permanent hostility.

§ 215. Cross-Examination an Oratorical Act: its Limitations.

The cross-examination is thus as truly classed among the oratorical efforts of the advocate as any other act that he performs. It does not, like the presentation of his own evidence, contain the elements of a complete oration. It does not purpose to conciliate, to convince, and to persuade. It is rather a species of refutation. Its nature is, in the main, destructive. It aims to overthrow, not to build up; to disintegrate and scatter, not to gather and consolidate. Hence its sphere is narrow, its methods are restricted, its forensic value limited. It is confined within the path marked out by

the direct examination. Its sole immediate objects of attack are the individual witness and his testimony. It aids the cause of him who conducts it just in proportion to the importance of the impressions made by that witness and his evidence upon the jury, and the extent to which those impressions are counteracted or removed.

§ 216. Cross-Examination: Cross-Examiner must Understand the Witness and the Impressions already Made by him upon the Jury.

Successful cross-examination presupposes in the cross-examiner a thorough knowledge of the witness and of the impressions which his evidence has made upon the jury. What impression it has made upon the advocate himself is of no consequence; it is not that impression which he seeks to counteract. Evidence which, in his view, annihilates his cause may, from some fault in its delivery, fail to catch their attention, while some small mote of doubt or contradiction, too insignificant to attract his notice, becomes a beam before their mental vision. To neutralize these impressions he must have perceived both them and the causes from which they resulted, and in the operation of these causes must discern the method by which their effects can be removed. Otherwise, however satisfactory to himself or to his client may be his efforts to destroy the witnesses, he will not impair the influence which they have exerted on the jury, and by his cross-examination will have retarded rather than advanced his cause.

§ 217. Cross-Examination: Duties of the Cross-Examiner during the Direct Examination.

During the direct examination the cross-examiner has thus three objects of study: the witness, his testimony, and the jury. He studies the witness that he may learn his points of weakness and of strength, and discover where his

armor is impenetrable, and where, in some swift moment of advantage, his mail will open to let in a deadly blow. He weighs the evidence, as answer after answer brings it in, and determines its degree of probability, the possibility of contradicting it, and its ultimate effect upon the cause. He watches with increasing vigilance the attitude and faces of the jury, with every spiritual sense alert to catch the echo or reflection of the ideas which occupy their thoughts and of the emotions which are working on their wills. So much of the result of all these observations as cannot be safely trusted to his memory, he notes on some convenient page, — a roster of the forces of the enemy, a rough but useful plan of his campaign.

§ 218. Cross-Examination: Cross-Examiner not to Interfere during the Direct Examination.

As far as possible the advocate should also refrain from interrupting the direct examination of the witnesses. Where evidence that is clearly inadmissible, and actually injurious to his cause, is offered, he must of course object, except when the same matter is certain to appear at some other period in the trial. But the mere fact that testimony is irrelevant or immaterial, or that the questions of the adversary are improper in assumption or in form, does not of itself warrant such an interruption. The attention of the jury is riveted upon the witness. They are endeavoring to follow the current of his thought, and to comprehend the ideas he is trying to convey. Any disturbance of this process by a third party naturally provokes them, even although they understand the interference to be sanctioned by the rules of law. In the controversy to which the objection leads, they always sympathize with him from whom they are deriving information. If the objection should be overruled, they will be pleased to see the intruder silenced; and if sustained, they are not likely to be satisfied with one who has deprived them of the oppor-

tunity to learn some fact, concerning which its very suppression makes them only the more curious. Still more to be avoided is that pernicious practice of interfering with the opposing witnesses during their direct examination. It is a constant habit with some counsel, naturally pugnacious and not possessing thorough self-command, to bristle at an adverse witness the instant he appears upon the stand. They cannot wait to study his character, to weigh his evidence, or to watch the effect which he produces on the jury, but on all provocations and on no provocation they assail him, scold him, and create general confusion. Such conduct necessarily prejudices all the hearers against the obnoxious advocate, calls down upon him the just censure of the court, and not infrequently provokes the witness to a swift and terrible retaliation.

§ 219. Cross-Examination: Interference of the Cross-Examiner during the Direct Prejudices his Cross-Examination.

No introduction to a cross-examination can be more unfortunate than this. A cross-examination, though a true intellectual and moral battle between the witness and the advocate, ought never to appear such to the jury. The contest is too evidently an unequal one. On this side, the trained lawyer, armed with all the weapons of forensic warfare, familiar with the court-room and its usages, and free to choose his times and methods of attack; on that side, the untrained witness, embarrassed by his strange position, bound hand and foot by rigid rules which compel him to be silent unless commanded to speak by his tormentor, and without other weapons than his native wit and honesty of purpose; the jury must be more or less than men if they do not instinctively array themselves beside the weaker party, and become eager to avenge his wrongs. In such a contest the only issue favorable to an advocate, who openly attacks a

witness, is one which satisfies the jury that the witness is a liar. Then the enmity and vituperation of the advocate will seem appropriate, and the revulsion in the feelings of the jury, when this fact appears, will carry their adhesion to him more decisively than any other possible event could do. But merely to exhibit the illiteracy or weakness of the witness as contrasted with the vigor and acuteness of his disciplined antagonist, if it be, as it rarely is, in any sense a triumph, is one unworthy of a generous profession and utterly unprofitable to a cause. A cross-examination should appear to be, what it really is, the serious performance of a duty, an earnest effort to arrive at truth. It should be dignified and courteous, not necessarily assuming, like the direct examination, that the witness is sincere and worthy of belief, but manifesting only the determination to elicit from him willing, and to wrest from him unwilling, the facts which he is able to disclose. Apparent severity in the examiner should, therefore, never be permitted to anticipate apparent demerit in the witness. On the contrary, his treatment by the advocate should be a manifestation of the feelings entertained toward him by the jury,—tender and considerate when they are friendly, rigorous and crushing when they become indignant and enraged. From this view of the cross-examination it is evident that the impression made upon the jury by an advocate who begins his conflict with the witness before he is fairly on the stand, and who treats him with rudeness and brutality while as yet he has given no offence save by appearing as a witness for the other side, must be a most disastrous one. So far from rendering any service, the ensuing cross-examination will seem but a more violent repetition of his wanton cruelty. With every new attack, with every new wound inflicted on the witness, the jury will realize only the more deeply the venom and mercilessness of the lawyer, and the defencelessness and weakness of his victim. The contradictions in the evidence, the

vacillations of the witness, his half-unwilling assent to the propositions of the advocate, all these will be forgotten. Nothing remains with them but their compassion for the insulted and downtrodden witness, and their repugnance and hostility toward his relentless foe.

§ 220. Cross-Examination: Interference of Cross-Examiner with the Direct: Method of, when Necessary.

Whenever, therefore, during the direct examination, necessity requires the intervention of the cross-examiner, he must interfere, not as an enemy, but as a respectful friend. As a general rule, the witness himself should never be personally addressed. Any suggestions as to his tone of voice, or the rapidity or clearness of his utterance, or the pronunciation or meaning of his words, should be directed to the counsel who examines him, or to the court itself. Objections to his evidence or to the questions of the counsel should be made in like manner; the advocate avoiding all collision or communication with the witness until at last he has him in his hands. By these means he may secure all the legitimate results which any interference could produce, and at the same time may approach the witness at the cross-examination without having been previously recognized by him as an enemy, and without having alienated from himself either the jury or the court.

§ 221. Cross-Examination: its Dangers.

The dangers which attend the cross-examination, although not numerous, are serious and subtle. One incautious inquiry may open the door to hostile testimony otherwise inadmissible. One leading question may stimulate the memory or imagination of a dull or rambling witness, and enable him to state important matters hitherto forgotten, or to reiterate with increased assurance and intensity what previously had been

insinuated rather than affirmed. The shrewd aggressive witness, sure to relate all the injurious facts at his command whenever opportunity is given him, in cross-examination often finds this opportunity, and how well he improves it every lawyer of experience has seen reason to regret. Even the stupid witness, over whose evidence the adverse counsel has brooded long in vain, roused by the apprehension of impending danger, and goaded by the stinging sneers and accusations of the cross-examiner, develops into an alert, vindictive enemy, and finally returns him blow for blow.

§ 222. Cross-Examination: Rarely to be Omitted.

No just excuse for the omission of a cross-examination arises, however, from the presence of such dangers. With care and skill all these can be avoided, but neither care nor skill can remedy the ills which may result from the dismissal of a witness without subjecting him to this ordeal. Except through some gross misconception of the adversary no witness is ever put upon the stand unless he or his evidence is calculated favorably to impress the jury. The assumption that no such impression has been made is rarely justifiable, and if it has been made, though in a slight degree, it is an act of folly to permit him to depart leaving that impression wholly undisturbed. Failure to cross-examine indicates to the jury either that the advocate does not dare to enter into conflict with the witness, or that he regards him and his testimony as too insignificant to merit his attention. If it indicates the former, the value of the witness to the other side is infinitely augmented ; if the latter, it reflects severely on the wisdom of the advocate, and on his claim to their respect and confidence, unless their estimation of the evidence agrees with his. Therefore, aside from those infrequent cases in which the witness has already made a bad impression on the jury, — a bad impression which his cross-examination is not

likely to intensify or may possibly remove, — the advocate should always cross-examine, not necessarily at any length nor with regard to the material portions of his evidence, but with sufficient vigor and persistence to show them that the testimony of the witness is not feared.

§ 223. **Cross-Examination: its Scope and Methods.**

The purpose of the cross-examination is to remove or counteract the impressions in favor of the adverse party made by the direct examination upon the jury. These impressions may be removed either by showing that the testimony already given by the witness is incorrect, or that the witness himself is unreliable. They may be counteracted by obtaining from the witness statements derogatory to the side which called him, or favorable to that of the cross-examiner. A cross-examination may thus pursue one or more of three methods. It may attack the evidence adduced on the direct; or it may attack the credibility of the witness; or it may use him as a weapon of attack against the adversary. Which of these methods it is advisable to adopt, in any particular case, must depend upon the circumstances. If the witness is known to be credible, the cross-examiner should endeavor to overthrow or qualify his testimony, or to render it or certain parts of it available in support of his own claims. Where, on the other hand, the witness can be successfully attacked, his evidence is by the same attack demolished, while every admission he may be compelled to make in favor of the cross-examiner is most effective. The cross-examiner should determine, at the outset, which of these methods is to be employed, remembering that, unless there is a reasonable prospect of showing that the witness is unworthy of belief, an attack upon him is usually unwise, and when made at all must be so quietly and insidiously conducted as to arouse no prejudices in the jury if it chance to fail.

§ 224. Cross-Examination: Exposure of Incorrectness in the Testimony of a Credible Witness: Incorrectness Arising from Faults of Expression.

Incorrectness in the testimony of a credible witness arises either from faults of expression which distort or conceal facts within his actual knowledge, or from his presentation of erroneous inferences as facts, or from his honest mistake concerning facts themselves. Each of these forms of incorrectness is by a careful cross-examination easily detected and exposed. Faults of expression which distort the facts described by a witness consist in the misuse of terms denoting acts or objects, or in the exaggeration or extenuation of their qualities. Nothing is more common than such errors of speech, even among the most honest and intelligent of narrators. They arise partly from ignorance of the precise meanings of words, partly from careless habits of utterance, partly from the intrusion of the imagination into the operations of the memory. The cross-examiner, if familiar with the facts narrated, finds no difficulty in discovering these errors; and even when not familiar with them, his general knowledge of affairs, and of the other facts involved in the transaction, suggests to him the points in reference to which the language of the witness is probably defective. Errors consisting in the misuse of terms can be corrected by requiring the witness to define their meaning as he understands it, to state the fact in other language, or to present such explanations and illustrations as will communicate his own conceptions to the jury. Exaggerations or extenuations so frequently occurring in relation to the distance, speed, duration, and certain other attributes of objects, and to the language, actions, and aspects of persons, can be eliminated by compelling the witness to compare the quality described with some known standard, or by presenting to him other matters that he has correctly stated as tests by which to measure and reform his estimate of these, or by

subjecting him to a rapid fire of disconnected questions touching the various details he has mentioned, by which his association of the events is broken up, and each is recollected and narrated free from the coloring which it reflected from the others. Faults of expression, concealing facts that the witness is able and is personally willing to disclose, are almost inevitable under the conditions which usually attend the presentation of his evidence. The more skilful is the opposing advocate, and the more thoroughly he has prepared his case, the more probable is it that the testimony given by his witnesses, in answer to his questions on the direct examination, has been confined by the forms of his interrogatories and their replies to matters favorable to himself; and that other inquiries, though on the same general subjects, may elicit statements which qualify while they complete the narrative as it now stands before the jury. For this purpose the cross-examiner may call upon the witness to repeat his story, unaided by questions, in the chronological order of events. His memory thus charged with an unexpected burden, and his mind awakened by the fear of error, he will endeavor to recite the transaction in its completeness as accurately as his command of language will permit, without reflecting on the consequences which may flow to either party from the disclosure. Or, if the witness is intellectually unequal to this effort, the cross-examiner may question him as to each detail and all its attendant circumstances, from the beginning to the end of the transaction, giving him time to recall, and encouraging him to state, everything he can remember which can throw light upon the incidents described. This mode of cross-examination contains one element of danger, — that the new matter elicited may strengthen rather than impair the impression made by that already placed before the jury, — and should, therefore, never be adopted unless the cross-examiner is reasonably sure that no such knowledge has been withheld by the witness, and that whatever he may gather on

the cross-examination will prove harmless to himself even if unprofitable.

§ 225. Cross-Examination : Exposure of Incorrectness in the Testimony of a Credible Witness: Incorrectness Arising from Stating Inferences as Facts.

Witnesses, like all other men, are liable to draw erroneous inferences from what they see and hear, and, having drawn them, to substitute them for the facts from which they were derived. Much of the evidence introduced in court, especially concerning promises, admissions, threats, and other spoken words, is of this character, the witness describing, not the language or events which operated on his senses, but the conclusions which he formed from them in his own mind. If undisputed, these conclusions are accepted by the jury as the facts themselves, and their judgment in the premises thus merely reflects that of the witness. Here, therefore, is a source of error which the cross-examiner should never overlook. His method of combating it is by refusing to receive the inferences of the witness, and insisting on the full disclosure of the facts on which the inference is based. If these are insufficient to support the inference, the jury will perceive its fallacy, or the advocate will expose it in his argument. If the facts are sufficient, and the inference correct, the cross-examination has been a source of neither loss nor gain. One great temptation, however, the cross-examiner must invariably resist,—the temptation to convince the witness of his error. If after he has stated all the facts the baselessness of his conclusion becomes evident to him, and he confesses his mistake, it is a signal triumph. But any attempt to force this confession from him is fraught with danger. So far from acknowledging his error he will often fortify it by new facts, remembered or imagined, which defeat the advocate and convince the jury.

§ 226. Cross-Examination: Exposure of Incorrectness in the Testimony of a Credible Witness: Incorrectness Arising from Mistakes of Fact.

Misrepresentations which arise out of mistakes as to the facts themselves are frequently discovered in the evidence. Men often think they see what they do not see, and still more often misinterpret what they hear. The physical senses, however accurate and reliable in themselves, depend for the correctness of their impressions so entirely on surrounding circumstances, that without considering these the truth of those impressions cannot be determined. Whenever, therefore, the direct examination has revealed important facts resting upon the sensations of the witness, the conditions under which those sensations were experienced demand the careful scrutiny of the cross-examiner. Thus, where the witness gained his information through the sense of sight, the degree of light, the distance and position of the object, the characteristics which distinguish it from other classes of objects and from other objects of the same class, its resemblance to surrounding objects, the familiarity of the witness with it, the extent and duration of his attention to it, and many other matters bearing a similar relation to the act of vision, are necessary subjects of inquiry. The operation of the other senses demands the same kind of investigation. The advocate will never be at a loss in this respect if he puts himself in the place of the witness at the moment the sensation was experienced, and realizes the difficulties which would have attended the operation of his own senses concerning the matters in dispute.

§ 227. Cross-Examination: Exposure of Incorrectness in the Testimony of a Credible Witness: Attitude of Cross-Examiner toward the Witness.

In this method of cross-examination it is assumed that the witness is credible, and is to be recognized as such by the

jury. No attack upon him by the cross-examiner, therefore, is permissible. He is entitled to the confidence which intelligence and honesty ought always to command, and to the courteous treatment which confidence inevitably inspires. An advocate who manifests toward such a witness a pugnacious or contemptuous disposition places himself at once in antagonism, not only with the witness, but also with the jury and the court, and every blow or sneer he offers to the witness recoils with fatal violence upon his cause. On the contrary, the attitude of the cross-examiner toward the evidently credible witness can only be that of an inquirer and a friend ; an inquirer who seeks further or clearer information from his lips ; a friend who modestly endeavors to enable him to lay before the jury whatever may shed light upon the merits of the controversy. Like that of any other friendly inquirer, his demeanor should be mild, respectful, and encouraging.

§ 228. Cross-Examination: Exposure of the Unreliability of the Witness: Causes of Unreliability.

No witness is worthy of belief unless he can accurately apprehend, remember, and describe events, is able and disposed to state them truthfully, and possesses a character which commands the respect and confidence of those who hear him. A cross-examination which reveals the absence of either of these qualities impairs his credibility, and thus diminishes, and perhaps destroys, the favorable impression which his testimony has already made.

§ 229. Cross-Examination: Exposure of the Unreliability of the Witness: Defective Apprehension: Disordered Senses.

The degree of accuracy with which a witness apprehends an object depends upon the condition of his physical senses, upon his previous acquaintance with the object, and upon the attention with which the object is surveyed. That the

defective operation of the physical senses may effectually prevent the witness from acquiring exact impressions of an action or event is self-evident. Imperfect vision of whatever nature or degree, deafness, destruction or perversion of the taste or touch or smell, close up the avenues through which ideas of the external world are usually communicated to the mind, and so far narrow the domain of knowledge. In every statement of a witness is involved the assertion that the sense through which his information was derived correctly represented to him the object he describes, and in the truthfulness or falsity of this assertion is the ultimate and crucial test of his reliability. This is a field of inquiry which the vigilant cross-examiner will never neglect to explore. In ages past it may perhaps have sately been assumed that, as a rule, the organs of sensation were in sound condition, but in these modern days no such presumption can be entertained. Whatever be the cause, the proportion of mankind in civilized communities who are known to suffer from the failure of one or more of these great organs to perform their proper functions seems to be increasing; and every witness who professes to have seen or heard, or to otherwise have had a physical apprehension of an object, may well be doubted until the soundness of the sense employed has been established. By a few practical experiments from materials at hand in every trial, these faculties of the witness may be tested so far as their correctness forms the basis of his evidence, and if they fail to undergo the test the evidence derived from them must also fail.

**§ 230. Cross-Examination: Exposure of the Unreliability
of the Witness: Defective Apprehension: Un-
familiarity with the Thing Apprehended.**

The previous acquaintance of the witness with the object apprehended, or with the class of objects to which it belongs, determines in no small degree the measure and the character

of his perceptions. In every object there is inexhaustible meaning ; the eye sees in it what the eye brings means of seeing. Those qualities of things which are not known to be inherent in them are rarely noticed. The ordinary traveller beholds in the fairest landscape only those common features of mountain, lake, and forest to which his thought as well as sight has been accustomed, its choicer beauties utterly escaping his inexperienced eye. To the uncultivated hind the vaulted roof, the clustering pillars, and the glowing frescos of a vast cathedral are as unmeaning as the brilliant accidents of the kaleidoscope. Man finds in every object only what he seeks. He sees that which he looks for, and no more. “To Newton and to Newton’s dog Diamond what a different pair of universes ! while the painting on the optical retina of both was most likely the same.” In every inquiry concerning past events, the ignorance or inexperience of the beholder is, therefore, a most important element. Whatever may have been his physical sensations, he saw that only which his eye was trained to see ; he heard that only which his ear was trained to hear ; and granting the accuracy of his memory, the correctness of his language, and the honesty of his purpose, the value of his testimony may be measured by his practical experience of that class of facts to which his evidence pertains. This practical acquaintance of a witness with the class of facts, to which the one narrated in his evidence belongs, may be ascertained either by applying to him some immediate and sufficient test, or by general inquiries concerning the extent of his experience. When practicable, the former method is the most effective, since, if well chosen, it at once demolishes his ignorant pretensions and destroys his credibility. The testimony of a witness, who has sworn ever so positively that an event occurred at a given moment by the watch, will be annihilated, if, when directed to consult the court-room clock, he cannot tell the time of day. The witness who unhesitatingly asserted the

identity of handwriting is disbelieved, if other writing of a similar appearance puzzles and confounds him. The most formidable scientific disquisition is robbed of all its influence as evidence, if some kindred problem presented to the witness remains without a satisfactory solution. No class of witnesses is proof against this method of attack, the most skilful and experienced experts succumbing to some simple test devised upon the instant by the advocate, and exposing to the dullest vision the worthlessness and weakness of their evidence. The general interrogation of a witness concerning his familiarity with any class of facts involves no special difficulty. Having pretended to a knowledge sufficient to enable him to perceive such objects as they really are, he will naturally exaggerate the extent and thoroughness of his acquaintance with them, and if disposed to falsehood will even invent instances and occasions through which his knowledge was acquired. The process of detecting and exposing these errors is the same as that employed in other cases of exaggeration and untruth.

§ 231. Cross-Examination : Exposure of the Unreliability of the Witness : Defective Apprehension : Want of Attention.

The degree of intellectual attention with which an object was regarded is another element to be considered in determining the accuracy and completeness with which it was observed. The impressions made upon the eye and ear are not necessarily communicated to the mind. By whatever psychological hypothesis the fact may be explained, it is still true that unless the thought is fixed upon the object of sensation the sensation terminates with the organic sense, exciting no ideas and leaving no trace in the memory. There is a constant ratio between the mental concentration of the observer on the object, and the fulness and precision of the ideas which he obtains concerning it. Trainers of animals

universally concede that their difficulties are diminished in proportion to the attention with which they are regarded by their pupils, and human scholars soon discover that their own progress is dependent on the exclusiveness with which their intellectual forces are devoted for the time being to the subject of their study. It is on this fact that the rule of evidence is based which gives to one affirmative witness greater weight than to many merely negative ; a recognition that though in all those who were present the same physical sensations may have been experienced, yet only those would intellectually apprehend the action or event whose thought was antecedently directed to it. By the same fact the wonderful variety with which the details of a transaction are described by a variety of witnesses is explained, each relating incidents which especially attracted his attention and omitting all the others.

§ 232. Cross-Examination: Exposure of the Unreliability of the Witness: Defective Apprehension: Want of Attention: its Causes.

The degree of attention with which any given object is regarded depends in part upon the power of mental concentration naturally possessed by the observer, and in part upon the circumstances under which the observation itself is made. Some persons, either through a constitutional defect or from improper training, have no faculty of fixing and controlling their own thoughts. Except in the rarest instances, they never give their full attention to anything. In reading, the eye scans the printed page, but the mind constantly wanders from it. In conversation, the ear catches the words, the understanding comprehends their meaning, and the tongue replies, but all the while the current of their thoughts is flowing toward entirely different subjects. Other persons habitually bend all their energies to the work in hand. Their eyes see all that their knowledge of the attributes of things enables them to perceive. Their ears catch every

sound of natural objects, every syllable and undulation of the human voice. Their senses are alive to every impression of the present moment, and what their sense perceives is communicated instantly and freely to their minds, uninterrupted by distractions, unconfused by reveries. Between these two extremes are all varieties of men, each of perceptions whose accuracy is in proportion to the attention with which he surveys the objects from which his physical sensations are derived.

§ 233. Cross-Examination : Exposure of the Unreliability of the Witness : Defective Apprehension : Want of Attention : its Causes.

The circumstances of the observer and the object, and the relations subsisting between it and him, also affect the attention with which he regards it, and its consequent impression on his mind. The degree of mental energy of every kind depends largely on the physical condition of the man himself. Weakness, discomfort, pain of whatever character or location, destroy his power of concentration, and centralize his thoughts upon his own distress. Mental disturbance, haste, anxiety, preoccupation, or any other sensible emotion, produces the same absorption in himself and corresponding inattention to external objects. The interest or indifference of the observer toward the object, its familiarity or strangeness to him, the motive in obedience to which he directed his attention toward it, its relations to him as the sole object of attention or but one object among many equally interesting and important to him, the duration and the force of its operation on his senses, the sensations which preceded it and succeeded it, and the effect produced by these upon the one in question, — in short, every circumstance which acted at the time upon his mind or body, and by which his attention toward this one object may have been diminished or intensified, is worthy of investigation and consideration, as

indicative of the degree to which the object took possession of his thoughts.

§ 234. Cross-Examination : Exposure of the Unreliability of the Witness : Defective Apprehension : Want of Attention : how Exposed.

The natural or cultivated power of attention with which the witness is endowed may be determined by immediate practical experiment. It usually becomes apparent during the direct examination. A witness of habitually attentive mind manifests it by the facility with which he comprehends the questions of the examiner, the readiness with which he answers, and the rapidity with which he accommodates himself to all the incidents of the proceedings. The unattentive man also soon indicates his weakness, misunderstanding even the simplest inquiries, repeating the questions as if uncertain that he correctly heard them, or continuing his story after notice to suspend. In cross-examination it is made still more apparent by directing his attention to an object or a person, and, after questions on another subject, asking him to identify the person or the object just before observed. A readier mode, and often more successful, is to inquire of him concerning some place or thing with which he is at least as well acquainted as with the fact to which he has already testified, and which is also well known to the jury, and by his failure to enumerate some of its principal and most striking characteristics exhibit his want of credibility in reference to the other objects which he has described. The results of such experiments are sometimes surprising; giving to the auditor an exceedingly low estimate of the attention with which men regard the most familiar objects, and consequently of the value of any statement as to what is seen or heard. The physical and mental condition of the witness at the moment of the observation, his interest in the object, the motives actuating him in its regard, its situation and

surroundings, may usually be successfully explored by any proper interrogatories. Few witnesses will hesitate to answer freely any inquiries on these points, and when an extraordinarily suspicious witness hedges and prevaricates, the common arts of cross-examination readily extract from him the facts desired.

§ 235. Cross-Examination : Exposure of the Unreliability of the Witness : Defective Memory : Defects Classified.

To such an accurate perception of events the credible witness must add a good and faithful memory. It is not easy to define in what a faithful memory consists. Some persons are endowed with excellent general memories, recalling the minutest details of events or conversations after the lapse of many years. Others remember with precision and completeness only certain classes of facts, — localities, dates, faces, names, or abstract processes of thought. Still others are without distinct recollections of any kind, their memories apparently preserving some faint, uncertain traces of almost every incident of their whole lives, but with no clear and definite impression in regard to any. In persons of the first description, the memory may always be considered good. In persons of the second, it is good whenever the thing remembered is of that class which their memories are accustomed to preserve, and bad, at least for all the purposes of evidence, when the fact belongs to that class which their memories do not retain. In persons of the third description, the memory is always bad, and on their uncorroborated evidence no question of importance ought to be decided. Were these distinctions generally understood, or if understood were they remembered and considered by the jury, the cross-examination as a test of memory should properly be limited to the power of the witness to retain impressions concerning the class of objects to which the evidence relates.

When the inquiry is as to the identity of persons, the ability of the witness to distinguish and remember faces, forms, and voices is the only faculty in question, and whether or not localities and dates are easily recollected by him is of no consequence whatever. In actual practice, however, the law permits the jury to infer a general want of recollection from a special one, and the cross-examiner to expose defects in memory by testing it with facts of any class that he desires.

§ 236. Cross-Examination: Exposure of the Unreliability of the Witness: Defective Memory: how Detected.

The direct examination of the witness in most instances informs the advocate as to the true condition of his memory. If he speaks positively and exhaustively concerning one class of facts, and hesitatingly or inaccurately concerning others, it may well be concluded where his weakness lies, and with what questions it may best be tested and exposed. If it be generally deficient, the whole field of the past is open to the advocate, and the more varied and disassociated are the topics it embraces, the more thoroughly are his defects revealed. On the other hand, if his memory appears generally perfect, and able to recall events of every kind with equal ease, the cross-examiner must discover a deficiency in reference to some class of facts as yet unnoticed, or his attempt will but corroborate the credibility it was intended to destroy.

§ 237. Cross-Examination: Exposure of the Unreliability of the Witness: Defective Memory: how Exposed.

The tests applied to the memory of a witness by the cross-examiner must be fully and immediately apparent, as such, to the jury. If the subject he employs is not one which the jury realize that they themselves would easily remember, the

failure of the witness to recall it will create no surprise. If it is so far outside of their sphere of information that, when he misremembers, or, not remembering at all, invents, they do not instantly detect him, they can draw no conclusion as to the strength or weakness of his memory. These tests must, therefore, be such as the jury are conscious that they could endure, and also such as they can see that the witness does not successfully sustain. Questions relating to important epochs in the life of the witness, to such facts in the cause as, if he tells the truth in reference to his knowledge of them, must have impressed him deeply, to those public events of which no man can be ignorant, to any striking occurrences in the court-room during the trial of the cause, to matters fully demonstrated in his presence by the testimony of preceding witnesses, or to objects to which the attention of the witness is directed and which after a few moments he may be requested to describe, answer these two requisites. With an honest witness this method of examination is short and easy; with a cunning and dishonest witness its success depends mainly on the judgment with which the subject for these tests has been selected.

§ 238. Cross-Examination: Exposure of the Unreliability of the Witness: Defective Powers of Expression.

The reliability of a witness, as a source of knowledge, is also measured by his power of expressing accurately and intelligibly the ideas which he has received and still retains. The real evidence — that which convinces — is the idea conveyed by the words of the witness to the mind of the jury, and whether this idea corresponds with the facts as they actually occurred depends no less on the propriety of the language in which they are expressed than on the fulness and precision with which they were observed and remembered. Faults of expression in the witness thus become faults of opinion in the jury, and scarcely less prejudicial to the inter-

ests of the cause than the utterances of ignorance or falsehood. Among uncultivated persons habitual errors of expression are not uncommon. They use words in an improper or provincial sense. They employ exaggerating epithets and adjectives. They describe objects, not by delineating their characteristic features, but in fragmentary outlines, or by portraying their most universal indistinctive attributes. They reproduce events, not in their proper order and relations, but with whatever sequence and connection the inspiration of the moment may direct. They do not lead, but mislead, the deductions of their hearers, with the best intentions and sufficient knowledge unwittingly producing false impressions on the minds of those whose mistake originates in the assumption that the words are spoken in the same sense in which they are understood.

**§ 239. Cross-Examination : Exposure of the Unreliability
of the Witness: Defective Powers of Expression:
how Detected and Disclosed.**

With witnesses of this description two methods of cross-examination are available, the choice between them depending on the purpose of the cross-examiner. If the facts known to the witness when completely and correctly understood are favorable to his cause, the cross-examiner should, as heretofore explained, endeavor to perfect and elucidate the testimony, aiding the witness to express the ideas which his memory retains, and spreading before the jury in its clearest and most convincing light the truth which, without such aid, he seems unable to convey. If the purpose of the advocate is, however, to destroy the testimony of the witness, a contrary method is to be adopted. Now the main effort is to exaggerate these defects, and to show how far they can distort the most common and familiar things. As soon, therefore, as the peculiar errors to which the witness is habitually subject are discovered, the cross-examination is to

be confined to matters which provoke them, and which are at the same time so well known to the jury that, without any explanation by the advocate, they can perceive that what the witness says is actually untrue. Thus, if he uses words in an erroneous sense, he should be led on to repeat them in reference to ordinary objects until the jury see that no reliance can be placed on his descriptions. If he exaggerates in reference to certain classes or attributes of things, he should be made to reiterate those extravagant expressions, not by repeating the same questions, but by eliciting his ideas of different yet kindred matters in regard to which the same kind of exaggeration is to be expected. A succession of impressions may thus be made upon the jury to the disadvantage of the witness, tending to convince them that in the other portions of his testimony the same uncertain and deceptive modes of speech prevail.

§ 240. Cross-Examination : Exposure of the Unreliability of the Witness : Untruthfulness : Classes of Liars.

A witness who is not able, or is not disposed, to tell the truth, fails in the most essential attribute of credibility, and from the moment when this fault becomes apparent to the jury their confidence in him and in his testimony is at an end. Of such witnesses there are three classes: The innocent liar, whose imaginations are so intimately mingled with his memories that he does not distinguish between the facts and fancies which occupy his mind, but believes and utters both alike as true; The careless liar, whose love of the pathetic or the marvellous, or whose desire to attract attention to himself, overcomes his weak allegiance to the truth, and leads him to weave facts and falsehoods together in his common conversation, to round out his narrations by the insertion of invented incidents, to give dramatic completeness to events by supplying with fiction whatever may be wanting

in the circumstance itself; The wilful liar, who for some definite purpose deliberately asserts what he knows to be untrue. Liars of the first two classes are not chargeable with grievous moral turpitude. Their faults are natural, usually imperceptible to themselves, though often known to their associates, and in the ordinary affairs of life are rarely productive of serious injury to others. In an age fed like our own upon the fruits of the imagination under the names of history, science, and theology, as well as of poetry and romance, it is no wonder that such liars should be numerous, and that comparatively few persons can tell a plain, straightforward story, every assertion and description of which will be strictly true.

§ 241. Cross-Examination: Exposure of the Unreliability of the Witness: Untruthfulness: Innocent and Careless Liars.

But whatever leniency may be extended to these proclivities of innocent or careless liars in ordinary life, none can be shown to them in the investigations of a court of justice. Men who are sworn to tell the truth, the whole truth, and nothing but the truth, in order that upon their statements issues involving human rights and liabilities may be determined, cannot be permitted to indulge in these vagaries, even although they have no consciousness of evil. On this point juries as well as judges are, as they ought to be, extremely sensitive. A wilful and malicious perjurer scarcely meets a surer or a swifter repudiation at their hands than does the undesigning liar. If no one else realizes the necessity of exact fidelity to truth, those whose correct discharge of duty is to depend upon the correspondence of the evidence with facts are certain to appreciate it, and to demand in every witness an integrity on which they can implicitly rely. The cross-examiner will find it no prolonged or arduous labor to expose them. The innocent, imaginative liar is

generally endowed with no remarkable astuteness, and, being honest in his intentions, readily follows wherever a kindly questioner may wish to lead him. Most of the facts concerning which he testifies made, at the time of their occurrence, no powerful impression on his mind, and have not since been verified by personal examination or external authority. When he was called upon to state them, at the instance of the adverse party, the natural desire to serve a friend stimulated his imagination as well as his memory, and the story he related was the net result of fancy and recollection. The cross-examiner may take advantage of the same docility in order to exhibit to the jury his liability to self-deception. If circumstances which they know did not occur, but which are in keeping with the other parts of the transaction as narrated by him, are now suggested to him, his imagination is very likely to insert them into the picture which his memory preserves, and he will express his certainty of their existence with as much positiveness as that of any other matter to which he has testified. This process may be indefinitely repeated, until the jury see that he is willing to adopt and swear to any details which are not manifestly improbable, or until his contradiction of other witnesses, or of former portions of his own evidence, destroys their faith in his intelligence or honesty. An alternative, or sometimes an additional, mode of cross-examining this witness is to compel him to narrate the transaction piecemeal, beginning in the middle of its history and skipping from one portion to another, reversing or confusing its chronological order. Variations and omissions will probably result, which, if not significant enough to discredit the witness, can be so easily magnified by the suggestions of the cross-examiner as to make it evident to all beholders that the witness has no actual knowledge or convictions of his own, but simply reflects impressions created by his fancy from within, or by the promptings of his questioner from without. The

exposure of the careless liar is a work of little difficulty. The cross-examiner needs but to apply the goad, and give him rein. The same qualities which mislead him in his statements in regard to one event operate on all the occurrences of life, and in his mouth "a little one" always "becomes a thousand," and "two roistering youths" develop into "eleven men in buckram" and "three in Kendal green." Let fitting incidents, whose details are already accurately before the jury, be but presented to him for description, and his palpable additions and exaggerations will complete his ruin.

§ 242. Cross-Examination : Exposure of the Unreliability of the Witness : Untruthfulness : Wilful Liars : When to Cross-Examine.

The wilful liar, though probably a rare phenomenon, sometimes appears within our courts, and when he does appear generally eludes or baffles all the artifices of the cross-examiner. Whether a witness of this character should be cross-examined at all, save in a few unessential points in order to distract the attention of the jury from his former testimony, or upon matters which, as he states them, will make impressions favorable to the cause of the cross-examiner, is a question that always merits careful consideration. He is known to be an active and aggressive enemy; one who is willing to sacrifice justice and conscience for the sake of gratifying his hostility, and who will probably avail himself of every opportunity to inflict further injury by even more atrocious falsehood. An encounter with such an enemy upon any important matter should, if possible, be avoided. Where his testimony covers no subject which is not embraced within the evidence given by other witnesses upon whom the resources of cross-examination may be more hopefully expended, or where he can be openly contradicted or impeached, it is the wiser policy to dismiss him without afford-

ing him a chance to increase the mischief which he has already done. But where he is the sole witness who testifies to a material fact which, unless he is discredited on cross-examination, the jury will believe to the great damage, if not the destruction, of the cross-examiner, the latter has no alternative but to attack the witness, and endeavor to expose him by his own words and manner as the wanton and conscious liar that he is.

§ 243. Cross-Examination: Exposure of the Unreliability of the Witness: Untruthfulness: Wilful Liars: Modes of Cross-Examining.

An open attack upon a wilful liar in order to compel him to confess his voluntary falsehood is nearly always useless, at least until he has been driven to the wall by a superior foe, or has been reduced to such a state of mental confusion that he is willing to admit whatever the victorious cross-examiner may see fit to demand. His willingness to lie may with more ease and certainty be shown by unveiling the evil motives which impel him, or by entangling him in inconsistencies and contradictions which render it impossible to accept any of his statements as worthy of belief. Which of these methods the cross-examination shall pursue, or whether more than one shall be adopted, must be determined by the advocate in view of the mental and moral constitution of the witness, and the nature of the false testimony which he has already given.

§ 244. Cross-Examination: Exposure of the Unreliability of the Witness: Untruthfulness: Wilful Liars: Exposure of Evil Motives.

A wilful liar is always animated by a definite purpose. He has some object to accomplish which he deems important, and which in his opinion will be furthered by his falsehood. All his inventions and suppressions are thus instigated by a

motive strong enough to overcome his natural regard for truth, and in obedience to which he sacrifices self-respect, and imperils both his honor and his safety. If he can be compelled to indicate this object in such a manner that his interest in it, and its connection with his evidence, are clearly seen, his motive to deceive will be apparent, and the jury, knowing well that whenever motive and ability concur the act will follow, and recognizing that the impossibility of contradiction gives him an unlimited ability to lie, will soon withdraw from him whatever confidence they had before bestowed. In this method of attacking a false witness two lines of inquiry become important: first, as to the existence of the motive; and second, as to the extent to which his will is under its control. Direct questions upon these points should, of course, never be propounded. No witness who is not a party will acknowledge that in testifying he is serving his own private ends, and even a party will deny that he is so far interested in the cause that he would lie to further it. The advocate must disclose the motive by eliciting from him the facts from which the motive springs, and must manifest its strength either by exhibiting it in actual operation, or by aiding the jury to apply their own knowledge of human nature to the estimation of its force.

**§ 245. Cross-Examination: Exposure of the Unreliability
of the Witness: Untruthfulness: Wilful Liars:
Exposure of Evil Motives.**

The motives which impel a witness to suppress truth or to utter falsehood arise either out of his relations to the persons connected with the cause, or out of his interest in the issues or the judgment of the cause itself. Few witnesses are so indifferent both to the persons and to the controversy as to be beyond the influence of any motive to deceive. Even so slight an act as the acceptance of a witness fee, or a mere voluntary appearance on the stand, often commits the wit-

ness to the party who has called him, and develops in his mind a prejudice against the other side. To such infirmities all human evidence is subject, and the jury are expected to realize them, and to make allowance for them, without other assistance from the advocate than is afforded by his argument. Those intimate and permanent relations which constitute our social and domestic life give rise, however, to motives of a graver character and more disastrous influence. A witness who, by ties of blood or marriage, is connected with the party in whose interest he is called, or who is united with him in some business or religious enterprise, or has shared with him in the profits and the burdens of political or criminal achievement, or who in any manner or degree is controlled by him in property or freedom, or on account of past or promised favors has incurred obligations toward him, labors under strong temptations to uphold and vindicate him, even at the expense of truth. Similar relations between the witness and another witness whose testimony needs corroboration by his own, or between him and the counsel who conducts the cause and whose success depends to some extent upon his evidence, engender the same motives, less intense perhaps, but leading often to the same calamitous result.

§ 246. Cross-Examination: Exposure of the Unreliability of the Witness: Untruthfulness: Wilful Liars: Exposure of Evil Motives.

Another motive to falsehood may be found in the hostility of the witness toward persons who are adversely interested in the cause. The object of his animosity may be the party whose rights he now maliciously endeavors to destroy, or it may be another witness on whom the perjurer is striving to heap odium and disgrace, or it may be the advocate himself, now made the victim of some long hidden and on that account more bitter grudge; but whoever it may be, if such

hostility exists, it is almost as sure to manifest itself as lightning to escape the surcharged cloud. Good will and favor, interest, solicitude, may be successfully concealed, however strong the influence they exercise upon the mind, but it is the attribute of evil passions to obscure the perceptions and pervert the judgment, and thus to lead their miserable subject to betray himself, even while he considers his disguise the most secure. For this reason, the jury are not often left to ascertain the disposition of this witness by inferring it from other facts elicited on cross-examination. His manner, language, features, all proclaim it. The advocate has but to name approvingly the objects of his hatred, to offer him their conduct or their statements as a standard by which to guide or estimate his own, and his contemptuous or abusive answers will reveal his cherished enmity more clearly than the most calm and positive assertion. Against a hostile witness whose deadly venom hides itself beneath an open and ingenuous smile, and whom no cruel glitter in the eye, no sharp inflection in the voice, no dexterous use of treacherous words, confesses as a foe, the advocate must employ weapons of the same character as against those whose falsehood springs from favor for his adversary ; and by disclosing personal or family feuds, or social or religious or political antagonisms, or other forms of purchased or legitimate hostility, supply the jury with the facts from which his motive to suppress or to pervert the truth may be concluded.

**§ 247 Cross-Examination: Exposure of the Unreliability
of the Witness: Untruthfulness: Wilful Liars:
Exposure of Evil Motives.**

The interest of a witness in the cause itself, as distinguished from the persons actually connected with it, assumes innumerable forms. Besides the direct gain or loss which may result from its decision, its indirect effect upon him by relieving him from liabilities, by settling questions which in future

cases will bear directly on his property or person, by influencing the minds of other individuals in a direction favorable to his wishes, by fulfilling his predictions, by determining a wager he has staked upon the issue, or by any other method which flatters his vanity, modifies his dominion over others, or increases or diminishes his social or business prosperity, produces motives toward truth or falsehood even stronger than his love or hatred for his fellow men. Some of these forms of interest were anciently regarded by the law as so certain to eventuate in perjury that the interested person was forbidden to become a witness, and though these disabilities are now nearly all removed, and the jury are permitted to determine how far the interest of the witness is likely to affect his credibility, yet this removal of the legal incapacity was not intended to, and does not, clothe the witness with any presumption of reliability, nor relieve him from the suspicion or the unbelief which his relation to the cause provokes.

**§ 248. Cross-Examination : Exposure of the Unreliability
of the Witness : Untruthfulness : Wilful Liars :
Exposure of Evil Motives.**

In the endeavor to disclose the facts from which these various motives are to be inferred, the cross-examiner is liable to meet with opposition both from the witness and the court. Some of these personal relations and these forms of interest are necessarily so widely known that the witness will not venture to deny them ; and their influence in producing motives to deceive is so apparent that the court will never hinder their complete investigation. In reference to these, therefore, direct and open questions may be freely asked, care being taken not to lead the witness, by insinuating that they are impelling him to falsehood, into a protest that in spite of these he would not lie. But many other interests and relations are known only to the witness and to his familiar friends, and hence he may disclaim them with impunity ;

or their effect in generating motives to deceive may be so doubtful or remote that, in its dread of entering on collateral matters or its desire for expedition, the court will instantly prohibit the inquiry, although the jury and the advocate regard the fact as highly prejudicial to the witness. These facts must be elicited by indirect and incidental methods, by broad questions having apparently another purpose but so constructed as to compel the witness in his answer to reveal the fact desired, as one of the details of transactions or events to whose narration he attaches no importance, and the court makes no objection.

§ 249. Cross-Examination: Exposure of the Unreliability of the Witness: Untruthfulness: Wilful Liars: Exposure of Evil Motives.

The existence of a motive to deceive having been thus established, the advocate should now, if possible, exhibit it in actual operation, in order that its influence upon the witness may be clearly manifested to the jury. For this purpose he should confine his future inquiries to subjects which arouse and stimulate this motive, and should present these subjects to the witness in such aspects as will provoke it and display it in the highest possible degree. Each succeeding question should make a stronger demand upon it than the last, and require from him a greater sacrifice of his regard for truth. The absurd and evident falsehoods into which the witness may thus, step by step, be led, would stagger even the boldest liar if in cold blood or all at once they were proposed to him; and the impression made upon the jury, that he will stick at nothing in obedience to his friendship or hostility or interest, soon becomes so powerful that no evidence or argument is able to efface it. But caution must be exercised not to urge him on too swiftly, nor to overstrain his willingness to lie. One palpable refusal to obey his motive, from an

apparent fealty to the truth, will be sufficient to demonstrate the supremacy of conscience, and to counteract whatever bad impression may have been already made. With this exception, this form of cross-examination is attended with no especial danger, since no new matter need be introduced, while what the witness has already stated cannot be contradicted, and will, therefore, be believed unless his credibility is overthrown.

§ 250. Cross-Examination: Exposure of the Unreliability of the Witness: Untruthfulness: Wilful Liars: Self-Contradictions.

Another mode of cross-examining the wilful liar, which can be employed either as a substitute for or in addition to the foregoing as circumstances may indicate, consists of an attempt to involve him in such inconsistent statements that reliance on his truthfulness will be impossible. Where the witness is of a bold and zealous disposition, if the cross-examiner assumes toward him a mild and deferential manner, he will fearlessly endeavor to reply to any inquiry that may be propounded to him. Upon the points to which he has already testified he is probably so well prepared as to be able, under any questioning, to repeat and explain all their immediate details. Any attempt to make him contradict himself concerning these is, therefore, quite unlikely to succeed. But it is often possible, by adroit questions on collateral topics, to lead him into statements whose incompatibility with what he has previously declared is either at once apparent to the jury, or can be made so by the future argument. All facts are so related to each other that every truth must harmonize with every other truth, and every falsehood contradict not only some particular truth, but every other truth whose existence is conditioned on or interwoven with the one denied. The testimony of a perjurer is thus surrounded on

all sides by facts which overthrow it, and the great problem of the cross-examiner is how to extract from his own lips those truths by which his falsehood may be swept away. In attempting this circuitous attack the advocate should carefully conceal everything that might lead the witness to imagine that his falsehood is suspected. It is impossible for him to have prepared himself on every topic that may be connected with his evidence, and upon such as he has not prepared he will reveal the truth unless suspicious that they tend to contradict him. His attention should be first called to his former testimony, and its essential facts should be repeated. Then, diverging to the selected topic, he should be led away from the material parts of the transaction and carefully interrogated concerning matters not apparently related to his former statements, yet so associated with them as to serve as tests of truth. No line of collateral inquiry, however insignificant, is unworthy of this kind of exploration. The most trivial event may demand for its occurrence those conditions which could not have coexisted with the facts as stated by the witness, and thus may demonstrate the falsity of his assertions. This mode of cross-examination, more than any other, requires exhaustless patience. Experiment after experiment may be tried and fail, and success at last elude the most persistent efforts. But if the questioning be skilfully conducted the worst result is that the testimony of the witness remains undisturbed, neither corroborated nor intensified because no portion of his principal narration has been taken as the subject of the inquiry; while if it be successful, unless the advocate through an insanity begotten of his triumph casts away the fruits of victory, and destroys all future possibility of conquering the witness, by exposing to him his own inconsistency and giving him an opportunity to reconcile it, his overthrow will be complete, and his value as a witness will be totally extinguished.

§ 251. Cross-Examination: Exposure of the Unreliability of the Witness: Untruthfulness: Wilful Liars: Self-Contradictions.

With a lying witness of a timid and suspicious disposition this artful mode of cross-examination will not avail. He sees a snare in every question, however innocent and trivial it may be, and when he lies most stoutly trembles most with apprehensions of discovery. He usually knows nothing about any subject save the one to which he testifies, and nothing about that except the story he has learned. His chief endeavor is not to commit himself to anything beyond the statement he has been employed to make. To questions which directly touch that, he is therefore ready with his answer; to every other inquiry he replies that he did not take notice or does not remember. It is useless for the advocate to conceal his opinion of this witness. He perceives already that he is mistrusted, and the manner of the cross-examiner should show him not only that his falsehood is suspected, but that it is fully known. Circumlocution here is needless. The advocate, fixing his eye upon that of the witness, standing as near him as convenient, and always, if possible, looking down upon him, should go straight to his object; command him to repeat his story, and permit him to attempt it, undisturbed by interrogatory or interruption. It well may happen that, in the discomposure of the moment, he will relate it so differently as to stamp him as a liar in the estimation of every one who hears him. If this be so, the cross-examination should terminate at once, giving him no time to recover himself and no opportunity to explain his contradictions. Should this ordeal be successfully endured, another method of attack may be adopted. The witness may be questioned in regard to such details of the transaction as he has not already stated, and in reference to which it is unlikely that he has prepared himself. The answers which he gives, if any, will probably be invented by him on

the spur of the moment with the intention of supporting what he has already said, and should be carefully observed and noted down. The inquiry should then run off into unimportant matters, and while the mind of the witness is thus diverted the questions to which these invented answers have been given should be again suddenly and rapidly propounded. The witness, having no chance to recall the answers which he previously made, will now invent again, with every probability of involving himself in fatal contradictions. Another method of attacking such a witness is to take his story as he has already told it, and, beginning where he left off in the direct, to lead him backwards through it, skipping from point to point to break the chain of association in his mind, giving him no time to invent or to reflect upon the consequences of his answers, fixing him to dates, places, names, and order of events, and then, after a few moments of diversion to foreign matters, to return to these details and go over them again. It is scarcely possible for a lying witness so to prepare or guard himself that in one or other of these methods the falsehood of his evidence may not be demonstrated.

**§ 252. Cross-Examination : Exposure of the Unreliability
of the Witness : Untruthfulness : Wilful Liars :
Contradiction of other Witnesses.**

Again, the cross-examiner may attack a wilful liar by attempting to involve him in contradictions with other witnesses whose credibility is above suspicion. The points of inquiry selected for this purpose must be related to the cause, and either conclusively established by evidence already offered, or capable of being proved by that which is about to be produced. They must also be such as the witness clearly knows, or clearly knows that he does not know ; for the contradiction sought is one that demonstrates the liar's evil will, and therefore has no reference to matters of

opinion, about which upright witnesses may widely differ, nor to long past sensations into which errors of memory or perception may have innocently entered. On any of these points the cross-examiner may test the witness by questions which do not disclose their actual purpose, in the hope that he will make some statement by which his disposition to pervert the truth will be revealed. A single instance of wilful falsehood will be sufficient to destroy him. The maxim, "Falsum in uno, falsum in omnibus," expresses not merely a rule of law, but the natural instinct of all honest men, who will unhesitatingly repudiate a witness when once his voluntary untruthfulness appears.

§ 253. Cross-Examination: Exposure of the Unreliability of the Witness: Bad Character.

The credibility of a witness is scarcely less affected by the opinion which the jury may entertain concerning his personal character, than by their knowledge of the accuracy of his intellectual operations or his truthfulness. In every community there are many individuals whose statements upon any subject are accepted and believed, without an inquiry as to their powers of expression, memory, or perception, simply on the faith engendered by their known integrity and wisdom ; and few are the communities in which there are not some whom nobody believes, except when they confess themselves most miserable sinners. This natural tendency to regard the word of the industrious, law-abiding citizen as true, and to doubt the veracity of the idle, dissolute, and shiftless, affects the jury in the court-room equally with persons in ordinary life ; and hence to expose the adverse witness to them as a man of evil inclinations, immoral habits, and disreputable associations is to arouse against him suspicions of unreliability which diminish, and sometimes remove, whatever good impressions his testimony may have made. The law of evidence indeed places limitations to this species of investigation, in order to

prevent the raising of side issues, and to protect a witness of present upright character from an unnecessary publication of his ancient faults. But the remaining field is wide enough for all the purposes of the cross-examiner; and when he chances to exceed it, since the witness only can object to his inquiries and can decline to answer only on the ground that his reply would criminate or disgrace himself, his silence is as serviceable as his speech. The real point of inquiry, however, is the reliability of the witness as he now stands in court giving his testimony, not whether he could have been relied on years ago if he had then been offered as a witness; for it is as certain that the liar may become a truthful man as that the truthful man may become a liar, although the latter process is more easy than the former, and what the witness was is thus of slight significance upon the question as to what he is. If the cross-examiner confines himself to this point, he will find material sufficient for all legitimate uses in the present employments, pleasures, and companionships of the witness; and these can be exhibited to the jury, if not by direct inquiries, by general interrogatories into whose answers these facts will be interwoven by the witness. This mode of cross-examination is frequently advisable, especially in our own day, when so large a proportion of witnesses, particularly in criminal cases, are open to suspicion on account of their habitual depravity of mind and conduct; and rarely is it fraught with danger to the cross-examiner, since, if the attempt at an exposure of the witness fails, it does not add to the impression made by his direct examination, unless it has been so conducted as to appear a wanton aspersion of the witness, and has thus aroused for him the sympathy of the jury. But where the testimony which the witness has already given is correct, and to the cross-examiner is known to be so, and the witness in delivering it has unquestionably endeavored to be honest and impartial, it is a violation of both truth and justice for the cross-examiner to lift against him this weapon of

attack, which is intended for the overthrow of falsehood and the detection and destruction of the wilful perjurer.

§ 254. Cross-Examination: Exposure of the Unreliability of the Witness: Impeachment.

A process having the same object as the foregoing mode of cross-examination is the impeachment of the witness, and although its method is entirely different from that of cross-examination, this similarity of purpose renders its discussion in this place appropriate. Impeachment consists in showing that the reputation of the witness for veracity, among those who know him best, is not equal to that of men in general. Where this can be clearly proved, it of course destroys the force of his evidence, and the confidence with which the jury might otherwise have regarded him, and also reflects discredit on the parties who have called him. But the difficulties which attend this proceeding are very great. Few persons are willing to appear in court to sustain such an accusation against a neighbor, and if they do appear their testimony is likely to be given in such mild and diluted phraseology as to deprive it of its value. Even when their testimony is direct and positive, a skilful cross-examination usually reveals the fact that the impeaching witness is hostile to the impeached; a fact which naturally weakens the effect of his evidence, although his hostility is the result of injuries inflicted upon him by the witness whom he now attacks. Moreover, almost every man, however infamous, has adherents whose testimony to his credibility will be given promptly and vigorously, and without the appearance of hostility or bias which attaches to the evidence of the impeaching witness. And finally, as the impeachment of a witness involves the allegation that he not only has committed perjury, but possesses an habitual disposition to commit it, the impeacher must encounter all those humane instincts in the minds of the jury which lead them to believe every witness to be honest in his general

intentions, although in special cases he may be misled by prejudice or error. These difficulties render such attacks upon a witness exceedingly hazardous, since when unsuccessful they recoil with terrible effect upon the head of him who makes them. For this reason, they should never be attempted unless success is certain.

§ 255. Cross-Examination: Counterbalancing the Impressions made by the Direct.

Where neither the witness nor his evidence can be successfully attacked, and in many cases where they could be if the advocate desired to do it, an effective mode of cross-examination consists in eliciting from the witness testimony favorable to the cross-examiner. This process is to be distinguished from that whereby the cross-examiner makes him his own witness, and questions him concerning new matter which could not properly be made the subject of the cross-examination, — a practice often adopted from economic motives, but, except in very rare instances, altogether contrary to oratorical rules, since it throws away the opportunity to make the strongest possible impression upon the jury by adding to the number of the witnesses, and producing their testimony in its proper order and connections. The mode of cross-examination here described does not attempt to introduce new matter, but by the use of matter already stated to make an impression on the jury in favor of the cross-examiner, as a counterbalance to the one created by the direct in favor of his adversary. Matter available for this purpose is rarely ever wanting. It is scarcely possible for any witness to testify without disclosing something favorable to the other side. Its nature and comparative importance are of little consequence, only so it be evidently favorable, — even the expression of a doubt as to some trivial matter being capable of acquiring great significance from the earnestness and persistency with

which the cross-examiner interrogates the witness concerning it. The method of conducting this inquiry depends mainly upon the personal character and appearance of the witness himself. If he is manifestly credible, and has already won the confidence of the jury, the cross-examiner should, if possible, first draw from him by direct questions an assertion that he has no interest in the cause, and would as willingly have testified on behalf of one side as the other, and should then call his attention to the favorable matters just as he has stated them in the direct. The witness will not flatly contradict himself, but will probably again affirm them and by each affirmation seem to be affording strong support to the side of the cross-examiner ; while if he qualifies his former language, and thus renders these matters less favorable, he will at once arouse suspicions in the jury as to his own honesty and truthfulness. Where, on the other hand, the witness is of bad appearance or is evidently hostile, the cross-examiner, without preliminary questions, should ask him whether he did not state such and such matters on his direct examination. He cannot deny them without self-contradiction. He cannot qualify them without impugning his own credibility. If he admits them, they are so many concessions in favor of the cross-examiner, apparently wrung from him against his will, and gathering from that fact an importance altogether beyond what they intrinsically possess. In pursuing this mode of cross-examination, the attention of the witness must be strictly confined to the favorable matters selected for that purpose by the cross-examiner. No questions should be asked him concerning any other portions of his direct testimony, nor should he be permitted to repeat them. This limitation is absolutely necessary to the success of the entire experiment, whose only object it is to present him as a witness favorable to the cross-examiner, although by accident or choice he has enlisted on the other side.

§ 256. Cross-Examination: Qualifications of the Cross-Examiner: His Knowledge of the Cause.

From this description of the different modes of cross-examination it is apparent that every cross-examiner has immense resources at his command. Whether he is able to employ them is a different matter. A good cross-examiner must possess certain personal qualities. He must have a courageous disposition, a quick wit, a good command of language, and great patience. A man of timid and retiring temper, or who must stop and think what to do next or what to say, or who becomes irritated at trifles, is utterly unfit for these encounters, and should never undertake them. No contest between men, whether on the athletic or the martial field, demands more boldness and daring, greater alertness of perception and swiftness of decision, wider command over the weapons of attack and defence, or stronger self-control, than that which in the peaceful forum is often waged between a witness and his cross-examiner. But even the best of cross-examiners is comparatively powerless without a thorough acquaintance with the persons and the things which his case involves. Theoretically, his cross-examination never is, and practically it never ought to be, a fishing process, in which he angles for an unknown prey. To expose errors in the testimony, to unveil the infirmities and corruption of witnesses, to make them advocates for his own side of the cause, he must have known beforehand the facts to which they now inaccurately or with reluctance testify, and the personal characteristics they would now conceal. If in his preparation of his side of the case he has investigated both sides, probing all facts whether favorable to him or unfavorable, interviewing all witnesses whether friendly or hostile, exploring all the circumstances which reveal the dispositions and proclivities of persons and the qualities of things, he becomes almost resistless in his conflict with a witness, and the good impressions made by the direct exam-

ination, however stable and conclusive, are beaten out and vanish underneath his blows. Just in proportion to his want of such a preparation is his loss of power. Accident may sometimes reveal to him matters for cross-examination, and thus supply the place of personal research, but, so far from encouraging him to further negligence, these fortunate deliverances should earnestly admonish him of the disadvantages and dangers of a warrior who meets his foeman while ignorant of his tactics and his arms.

§ 257. Cross-Examination: Manner of the Cross-Examiner.

Finally, the manner of the cross-examiner should be suited to the work in which he is engaged. Although he is in combat with the witness, yet it is not a conflict of physical or verbal forces, but of intellectual skill and moral energy. Moral and intellectual contests are not characterized by rudeness or recklessness of speech or action, but by earnestness, courtesy, and forbearance. To denounce the witness, to browbeat and attempt to crush him, is permissible in but a single instance, and that is where both advocate and jury suspect him to be a wilful liar; yet even then the harshness of the cross-examiner must not transcend its proper bounds, or his abuse and vilification of the witness may change the feelings of the jury from sympathy with him into pity for his victim. All other witnesses, under all circumstances, are entitled to respectful treatment; and when they do not receive it, the jury have the power to make the erring lawyer bear the penalty, and verdicts have been known to turn against a rough, insulting cross-examiner on this account alone. With that restriction, the cross-examiner must accommodate his manner to the witness and the inquiry. As the occasion and his purpose may demand, he must be dignified or jocular, distant or deferential, seductive or severe.

CHAPTER XI.

OF THE RE-DIRECT EXAMINATION.

§ 258. Duties of the Advocate during the Cross-Examination of his own Witnesses: To Protect his Witnesses.

During the cross-examination of his own witnesses the advocate has two important duties to perform. In the first place, he is to guard his witnesses, as far as possible, from such assaults as tend to prejudice his side of the cause. For this purpose he should stand ready to assist them, when too hardly pressed by the cross-examiner, with such objections and discussions as will distract the attention of the jury from the witness, and afford him time and opportunity to recover himself. Extreme prudence is, however, necessary in the discharge of this duty. Under no circumstances should he exhibit a desire to conceal anything from the jury, and therefore he never should object upon the ground that the matter which the questions of the cross-examiner are calculated to elicit ought not to be submitted to their consideration. Nor should he ever interfere merely to save the feelings of the witness, if the sympathies of the jury are already enlisted in his favor. Then the more abusive and venomous the cross-examiner becomes, the better for the advocate, and he should remain quiet until the witness begins to weaken in his evidence, or suffers so much that the failure of the advocate to rescue him is likely to provoke the censure of the jury, when he should interfere at once, and turn the current of the inquiry into another channel.

§ 259. Duties of the Advocate during the Cross-Examination of his own Witnesses: To Prepare for the Re-Direct Examination.

In the second place, during the cross-examination of his own witnesses it is the duty of the advocate to prepare himself for the re-direct examination. It is the object of the re-direct examination to revive the good impressions made by the witness during the direct wherever they have been weakened by the cross-examination, to add to or intensify them by the favorable disclosures which the cross-examination has produced, and to remove the unfavorable impressions which it may have left upon the jury. For this purpose, the advocate should watch the countenances of the jury as the cross-examination proceeds, and note every inquiry or reply which seems to attract their attention, endeavoring to realize in himself the mode in which it operates on them. Of all such matters, as well as of all answers of the witness which require explanation, or which seem contradictory, or which tend to discredit him, careful memoranda should be made, that when the time for re-direct examination comes the material for it may be at hand.

§ 260. Re-Direct Examination: its Field and Limits.

The field of the re-direct examination is, in each particular instance, measured by the necessities which the preceding cross-examination has created. All its objects of inquiry, however, will fall within the following classes: (1) Facts tending to show that the witness has not erred by misdescription, exaggeration, or extenuation in his direct examination; (2) Facts tending to show that he has not adduced false inferences as narratives of actions or events; (3) Facts tending to show that he has not himself been mistaken as to the facts which he narrated; (4) Facts tending to confirm the accuracy of his apprehensions, memory, and expressions, or to remove any suspicion as to his credibility arising from

his prejudices or interests or general character ; (5) Facts tending to reconcile apparent contradictions in his testimony ; (6) Facts tending to explain or weaken the force of new and adverse facts brought out on the cross-examination ; (7) Facts tending to explain and corroborate new and favorable facts brought out on the cross-examination. In one or more of these lines of investigation the advocate will find whatever may be profitable to him for healing the wounds inflicted by the cross-examiner, and for turning to his own advantage the facts which were intended for his injury.

§ 261. Re-Direct Examination: Not to be Omitted.

Except in those rare cases where the cross-examination has left the good impressions made by the direct entirely unimpaired, and has created no counter impression in favor of the cross-examiner, the re-direct examination should never be omitted. It occupies the same position in the oratorical act performed by the witness which the final argument occupies in the series of orations delivered by the advocates ; and as no lawyer fails to appreciate the benefits of the "closing turn," or to avail himself of them whenever the opportunity is offered him, so will he never without overwhelming reasons forego the privilege of making the last impression on the jury through the re-direct examination. It may consist merely of a single question, bringing out the strongest favorable fact to which the witness testified on the direct, or of a few inquiries covering important points of the same character which have been first revealed upon the cross ; but however brief or limited, its value is too great to render its neglect, in any ordinary case, excusable. Above all, a witness never should be suffered to depart while confused, or irritated, or in any way discredited, by the cross-examination. By questioning him concerning unimportant portions of his previous testimony his confusion may be removed or his irritation calmed, and when restored to himself the strong points in his evidence

may be repeated, thus enabling him to leave behind a good impression. Facts which discredit him he should be permitted to explain, qualify, or deny ; or, if this is impossible, the advocate, ignoring all the doubts cast on his character or evidence, should recur to prominent parts of his favorable testimony, treating him as the most credible of witnesses, and by the energy of the impression which he thus makes on the jury endeavor to efface the doubts and prejudices which they had begun to entertain.

§ 262. Re-Direct Examination: Method of Conducting.

The conduct of a re-direct examination concerning matters covered by the direct follows the rules previously stated in reference to that stage of the testimony. To return to them in the re-direct, when they have been made the subject of the cross, is not only permissible, but often expedient, in order that no doubt may exist as to what the witness does assert concerning them ; or they may be employed for no other purpose than to afford the witness a good exit from the stand. But where new and unfavorable matter has been brought out on the cross by way of explanation or addition to that given on the direct, great caution in dealing with it is essential unless it is already well known to the advocate. Being his own witness, any damaging statement or admission will come with great effect from him, and since the cross-examiner has already derived from such new matter all the advantage he can gain without assistance from the advocate, the latter should hesitate to risk an increase of the mischief by any inquiry whose answer he does not foreknow. If the witness is intelligent, and seems to wish to explain further, he may be allowed to do so ; or if the advocate from his general knowledge perceives that other facts, as yet unrelated, must have existed, which will change the aspect of affairs in his favor, he may interrogate concerning them ; but otherwise it is often the safer part to let the unpalatable statement stand and trust

to time and later good impressions gradually to obscure it. Anything that savors of a contradiction of the witness must always be carefully avoided. To attack his general credibility is equivalent to a confession on the part of the advocate, and on behalf of himself and his client, either that they have been imposed upon by a treacherous witness, or that they have purposely put upon the stand a man of untrustworthy character whose evidence they were willing that the jury should believe as long as it was favorable to themselves,—a confession which in neither case does honor to the advocate and in the latter is quite certain to be fatal to his cause. If the witness has unexpectedly disclosed upon his cross-examination matters injurious to the advocate who called him, and such matter cannot be explained or qualified by him, it should await its contradiction or extenuation by the evidence of other witnesses, while in the re-direct the advocate concerns himself with undisputed favorable matters which permit the witness to depart in good condition.

§ 263. Re-Cross-Examination and Subsequent Proceedings.

A re-direct examination should never, if it can be avoided, lay the foundation for another cross-examination. The advocate calling a witness has the right to close the inquiry, and should avail himself of it for reasons previously stated. But he should recollect that nothing can more effectually dwindle away the value of a witness and his evidence than to pass him back and forth from one counsel to the other, through a long series of examinations. It is not merely trying to the patience of the court and jury, and to the temper of the witness, but, as the field of each examination is necessarily narrower than the preceding, and the investigation settles slowly down upon some trivial point whose relation to the great body of the facts the advocates themselves perhaps do not perceive, the witness and his evidence are

constantly belittled in the estimation of the jury, and his value to the cause is measured rather by the trifles with which he concludes than by the important statements with which he began. Unless the practice of the court is lax in this respect, the re-direct examination will terminate the ordeal of the witness if the advocate confines himself to matters stated in the direct and the cross ; and when he opens the way for further cross-examination, it should be only for the sake of advantages great enough to compensate him for the loss of force which the testimony of his witness is certain to experience. Such re-cross-examinations and their re-direccts, when they do occur, are governed by the same rules as the principal examinations to which they are subordinate.

§ 264. Production of the Evidence : Fundamental Principle Governing the Advocate.

The nature of the impressions made upon a jury during the production of evidence demonstrates that its character is that of a true oratorical act. Where testimony is taken by deposition, and is examined and collated at his leisure by a single judge, who draws his own inferences from the facts and is free from any of those influences exerted by the presence of living witnesses and the incidents occurring in the court-room, this oratorical element is wanting. He is supposed to perceive all the evidence at once, to separate the important from the insignificant, and to arrive at no conclusion until the actual case is spread before him in its complete verity of fact and law. But before a jury the presentation of testimony is not only an act in which the qualities of oratory are exercised, but it is a true oration in the sense that it constantly progresses toward a predetermined end. A jury listening to evidence are never in a state of judicial equilibrium. Their minds are in perpetual motion, advancing with every favorable impression toward the decision which the advocate desires, receding from it with every one that is

unfavorable. Their mingled judgment and impulses are momentarily arriving at conclusions ripe for action, and with the next moment departing from them into new convictions, which in their turn will be as soon abandoned. Probably in any case in which a jury can eventually agree at all, the testimony could be arrested at no point without finding them ready to pronounce their verdict, though, if arrested but one witness earlier or later, the verdict might have been materially changed. If an oration is a dialogue wherein the orator continually answers those silent questions of his auditors which rise up in their thoughts as he proceeds, much more is this true of the production of evidence, which continually brings the minds of the jury to a point of rest whence further inquiry or action must originate, and as continually meets the springing inquiry with its reply. Such a process leaves no room for reflection and little room for memory. Few jurors at the close of a day's testimony could enumerate the witnesses, or repeat any substantial portion of their evidence, but nearly every juror could state how he felt in reference to the cause and how his feelings differed, if at all, from those of the night before. This is no strange condition, peculiar to juries or to forensic controversies. From any rapid series of unusual phenomena, whether addressed to the eye or to the ear, the mind retains merely a resultant idea or emotion, into which indeed all details enter, yet enter only to be individually submerged. If advocates who have prepared a cause for trial cannot trust themselves to remember and reproduce the facts collected by their personal research, or to address the jury upon the points produced in evidence without written memoranda, and in their own examination of the cause, with all its elements at once before them, often have serious doubts as to its justice and correct decision, surely no jury unfamiliar with the cause, hearing each witness once and once only, and that in the midst of distracting influences and preceded and followed by other witnesses of

different knowledge and expression, could preserve in their memories these separate narratives, or place each detail of the evidence in its appropriate relation to the issue. Even when summed up in the final arguments, or in the charge of the court, the jury do not so much recollect them as accept them as correct upon the authority of the advocate or judge. This operation of the testimony upon the minds of the jury, and the condition of the impressions it produces, indicates to the advocate the fundamental principle which should govern his production of the evidence in every stage of the examination. It should be his constant aim to make a *present* favorable impression on the jury,—to have them *now* well disposed toward him and his cause. How they felt concerning it an hour ago is of less consequence ; how they will regard it an hour hence is yet to be determined. But when that hour or any future hour arrives, the same aim and endeavor must provide for it. Hence the movement of the advocate must keep pace with the progress of the cause. What a witness testified yesterday did its work yesterday and is gone ; whether for good or evil matters little in comparison with what is being done to-day, and to-day's witnesses will in like manner make their mark upon the sand, and in like manner pass away. If the advocate directs his efforts in the line denoted by this principle, he will waste no time in reviving and assailing dead and buried foes. He will esteem it better to create new impulses in his favor, than to endeavor to remove unfavorable ones which have already slipped into the past. He will realize how much the jury will forget, how futile is the effort to contradict or to explain in trifling matters, how well he can afford to try his case on the great facts which it embodies, and to crowd these perpetually upon the attention of the jury, in every method intensifying and multiplying the favorable impressions they produce.

CHAPTER XII.

OF ALTERCATION.

§ 265. Altercation Defined.

Another mode in which the advocate presents his ideas to the jury is that of altercation between himself and the adverse counsel. During the entire progress of the cause more or less opportunity for this is offered in arguments upon interlocutory questions, and in the cross-fire of wit and repartee which springs up spontaneously among the advocates. Where no occasion manifests itself, one may be purposely created by some remark which provokes a discussion, in the course of which the desired statement can be made.

§ 266. Altercation : Subjects of.

The proper subjects for such altercations are of two classes: (1) Matters within the cause, which are at once favorable, important, and indisputable; (2) Matters without the cause, which will not be denied, and if known to the jury might influence their minds toward the desired decision. One attribute matters of both these classes must possess, — they must be indisputable. Altercation is not a contest in which the opposing advocates deny the assertions or impugn the veracity of one another. It is the affirmation of a fact which the affirmant knows will be conceded; and though it takes place in a conflict over some other subject, it forms no essential portion of the controversy. It is the communication of an idea which the advocate expects the jury to receive unqualified by explanation or by contradiction, a result impossible if the matter were open to denial.

§ 267. Altercation: Purposes of

Altercation serves several useful purposes. It enables the advocate to multiply the favorable impressions made upon the jury by the point employed. Repetition of the same matter in the oration is not only a violation of oratorical rules, but soon becomes disagreeable to the hearer, and must consequently be avoided. Repetition through the medium of the testimony is limited by the number of good witnesses who are able to assert it. But repetition by means of alteration is unrestricted save by the judgment of the advocate, and if the form and language of the assertion be varied, its substance may without wearisomeness be frequently presented to the jury. In this manner a fact in itself significant, but which might in the course of the proceedings be gradually forgotten, may be perpetually kept before the jury, and never cease to operate with its original energy upon their minds. Altercation also enables the advocate to introduce matters which could not be discussed at length in the oration, or which, if left till then, might produce bad impressions that can now be prevented, or which, though not admissible in evidence or capable of any formal presentation, are known to the jury, and need only to be connected with the case at bar in order to arouse their sympathies for his client, or excite antagonism toward his adversary. Facts in themselves of little consequence may thus be made to assume gigantic proportions, and to acquire a weight and value with which their intrinsic merits never could endow them.

§ 268. Altercation: Advantages of

The advantage of alteration is not merely that it permits the advocate to repeat the strong points of his cause without tediousness, or to introduce arguments and statements otherwise of little value, but that it always attracts attention, and fixes the minds of the jury on the point desired. As a momentary respite from the dulness of a trial it is always wel-

come, and if short, spirited, and good-natured generally aids the cause. Nothing is more displeasing, however, than a sour, boorish quarrelsomeness, which, simulating altercation, degenerates into mere personal abuse of the opposing party or his counsel.

§ 269. Altercation: Qualifications of the Advocate for.

To successful altercation a quick, active intellect, a dauntless courage, and a fluent tongue are necessary, as well as a clear recollection of all the facts connected with the case. A timid or slow-witted advocate, or one not thoroughly familiar with his cause, should never venture it ; he is more likely to provoke his own destruction than to molest his adversary. Premeditation as to what the adversary may reply to a proposed assertion, and how his answer can be met or turned against him, is always prudent, but to lay himself open to attack, without providing a method of escape or of defence, is an act of temerity in the advocate which deserves the punishment it will probably receive.

§ 270. Altercation: an Act of Invention.

Altercation, though primarily intended for the foregoing purposes, is, like the production of evidence, to some extent an act of invention. When thus employed, its object is to draw the fire of the opposing advocate, unmask his batteries, and discover what in his opinion are the strong points of his case. Unless he is upon his guard, in the heat and haste of these disputes a skilful and audacious challenge will meet with prompt acceptance, and in the strife which follows he may disclose what calmer judgment would teach him to conceal. The use of altercation for this purpose requires perhaps a keener sagacity and higher courage than any other act an advocate performs.

BOOK II.

OF EXPRESSION.

§ 271. Act of Expression : its Scope and Divisions.

The second act of practical oratory is Expression. This consists in clothing the ideas collected by the orator in such audible forms as will most convincingly and persuasively communicate them to his hearers. The importance of this act is evident from the fact that on its successful performance depends the entire effect of the oration, since through the forms selected for that purpose all the ideas received by the hearers from the orator must be conveyed. If, therefore, the ideas themselves have any value for his purposes, and warrant the research and labor which he has bestowed upon them, equally do they merit such attention to the mode in which they are expressed as will impress them with their utmost force upon the hearer. In this act of expression are involved three successive processes : (1) The choice of words to represent ideas ; (2) The collocation of words into sentences ; (3) The construction of rhetorical figures. It is the object of these processes to render the ideas intelligible and attractive to the hearer, to make him understand exactly what the orator intends to convey, and to arouse in him an interest in the subject of discussion so intense that his will shall resolve to do the act the orator desires. To every kind of writing and speaking these processes of course are necessary, but to oratory, and particularly to forensic oratory, specific methods are adapted which must be followed in order to attain the best results.

CHAPTER I.

OF THE CHOICE OF WORDS.

§ 272. **Words: Intelligibility: Defined: Elements of**

For the purposes of oratory no words are intelligible unless they express the exact meaning of the orator, and present it at once to the mind of the hearer, without demanding any reflection or delay on his part in order that he may fully comprehend it. The vocabulary of the orator is by this requirement far more limited than that of the writer or the conversationalist, since he must confine himself, at whatever loss of rhetorical excellence, to such expressions as completely convey his thought in the very instant of its utterance, and leave the hearer free to devote his entire attention to that which immediately succeeds it. A single word whose ambiguity or strangeness arrests the current of his mental operations, and holds him back while the orator passes onward, may effectually deprive the argument of all convincing force, and even so dissatisfaction the hearer with himself or the oration as to destroy all its persuasive power. Intelligibility is thus measured by two standards: one, the thought to be expressed; the other, the apprehension of the hearer. In reference to the thought to be expressed, words must be correct. In reference to the hearer, they must be words whose exact meaning he will immediately understand.

§ 273. **Words: Intelligibility: Correctness: Comprehension of Words.**

A word is correct when it exactly expresses the idea of the speaker. Every idea comprises certain elements which taken together constitute that idea. This is equally true whether

the idea is of an act, an object, or an attribute ; it continues the same idea only while its elements both in number and in character remain unchanged. This coincidence of an idea with the sum of its included elements is known as its comprehension : because it comprehends every subordinate idea embodied in or represented by these elements, and nothing more. A word exactly expresses an idea when its comprehension is identical with that of the idea ; that is, when its meaning embraces and is restricted to the constituent elements comprehended in that idea. If it embraces less, the presentation of the idea is incomplete ; if more, the presentation is redundant ; and in either case the idea is not conveyed to the mind of the hearer, unless he is already sufficiently acquainted with it to supply the missing elements or reject those which are superfluous.. Words imperfect by reason of such incompleteness or redundancy may suggest, but never accurately communicate, ideas. In a pure language, properly employed, no word would have more than one comprehension ; and whenever taken as the symbol of a thought it would always express precisely the same elements, united in the same manner. In the technical language of science and the arts this definiteness and perpetuity of meaning are attained, and the communication of exact ideas between their votaries is thus secured ; but in the vulgar tongue of any people many words gradually acquire several comprehensions, and so become unfit for the transmission, though often serviceable for the suggestion, of ideas.

§ 274. Words : Intelligibility : Correctness : Extension of Words.

A word is correctly used when it is applied to subjects whose essential elements correspond with those of the idea which the word is fitted to express. Every idea is predicable of a greater or less number of subjects. The idea of a genus may be affirmed of all its species ; that of a species, of all its

individuals ; that of an attribute, of every person, act, or thing in which it inheres ; that of an act, of every actor who could perpetrate it, of every object upon which it could operate, and of every method in which it could be performed. The number of subjects of which an idea can be predicated measures its extension. The wider the comprehension of an idea, that is, the more essential elements it comprises, the narrower is its extension, and the fewer are the subjects of which it can be affirmed ; while, conversely, the fewer its essential elements, the more numerous are the subjects to which it may be applied. An idea can thus in two ways be incorrectly presented to the mind : by including in it elements which are redundant or excluding from it elements which are essential, — a mistake as to its comprehension ; and by applying it to subjects with whose essential elements its own do not correspond, or by denying it of subjects between whose elements and its own there is a true agreement, — a mistake as to its extension. All errors in the apprehension of ideas and all errors in the use of such words as have but one comprehension are of one or the other of these classes, and by attending to the comprehension and extension of ideas and words may therefore be avoided.

§ 275. Words: Intelligibility: Correctness: Equivocal Words.

When a word has two or more comprehensions it is equivocal, and taken by itself is never intelligible. *Light*, for example, is used as a noun, a verb, and an adjective, and in each of these uses has several different meanings. Apart from the context, or from other circumstances which interpret it, no definite idea is conveyed by this word from the speaker to the hearer. The English language is full of these equivocal terms, and to their presence are due not only the inexactness of thought which characterizes the Anglo-Saxon mind, but multitudes of political, social, and theological con-

troversies which have no other origin than the use of the same words in different senses by the several contestants. Even the language of the law is infected by the same verbal pestilence. Words once of a single and precise signification have been misapplied, through ignorance or carelessness, in text-books, statutes, and judicial decisions, and new terms have been created and abused in the same manner, until it is no rare occurrence for our highest courts to contradict each other in their formulated statements of the law, although the doctrines they endeavor to announce are actually the same. Neither in writing nor in speaking ought such words ever to be used unless the sense in which they are employed is made unmistakable by those which immediately precede or follow them ; and from every oration they should be as far as possible excluded, since for the hearer to define the word by reference to the context is a work of time, and interrupts that close adherence of his mind to that of the orator which is so essential to ultimate success. If no word of one comprehension can be found which will convey the speaker's thought, it is therefore wiser to express the idea by a phrase or group of words which will explain itself, than to employ an equivocal term and trust to its interpretation by the hearer through other words by which it is accompanied.

§ 276. **Words : Intelligibility : Correctness : Tests of.**

The comprehension of a word is determined by its present usage, whatever may have been its etymological derivation or the meaning attributed to it in the past. Language is the vehicle of thought. In itself entirely artificial, it takes its character from the thought which it conveys, and what thought it conveys depends on the interpretation given to it by those who speak and hear it. The comprehension of a word may, therefore, vary from age to age, or in different localities ; but in, each case its meaning is, or ought to be, that which the current usage then and there bestows upon it.

The extension of a word, on the other hand, is fixed by the unalterable rules which govern the nature and the attributes of things. The comprehension of a term having been ascertained, everything of which the complete idea conveyed by that term can, as a matter of fact, be predicated falls within its extension, and to no other thing can it ever be properly applied. Correctness of words in writing or speaking thus consists in their employment for the conveyance of such meanings only as are attributed to them by the custom of the day, and in their application to those subjects only of which in their entire and exact meaning these words can be truthfully affirmed.

§ 277. Words: Intelligibility: Correctness: Acquisition of Correct Words.

In order to acquire a stock of correct words, and a facility in their correct use, the study of language in its current meanings, and the cultivation of a general knowledge of facts of every species, are essential. The study of language should be pursued in authoritative dictionaries and grammars which exhibit the usage of the best writers and speakers, and in the case of the orator should be extended beyond these into the peculiar usages which prevail among the common people to whom his thoughts are ordinarily addressed. The former field may be explored in the seclusion of his library; the latter only by direct association with the populace themselves, from whom he will unconsciously absorb their peculiarities of speech and become able to express himself to them in their own tongue. A general knowledge of facts is the result, for this purpose as for every other, of continual observation and research, opportunities for which are ever open, and in which the longest lifetime may profitably be expended. The treasures thus accumulated can be retained only by constant use and vigilance. The power to write and speak correctly; even when acquired, is quickly lost if its possessor indulges

himself on informal occasions in careless and inaccurate modes of utterance. Whether in conversation, in epistolary correspondence, or in memoranda intended only for his private use, his adherence to correct words and to their correct application should be as faithful as in his most labored efforts. Otherwise the faults which he admits in secret will soon contaminate his public compositions, and destroy that fidelity of words to thoughts, and thoughts to subjects, without which the communication of exact ideas becomes impossible.

§ 278. Words : Intelligibility : Understood by the Hearer.

A word, being intended to convey an idea to a hearer, cannot effect its purpose unless the hearer attaches to it the same meaning given to it by the user. In equivocal words this identity of interpretation is by no means certain, even when both parties are equally acquainted with the word. Univocal terms, to which but one meaning is possible, if known to both parties, communicate to one the precise idea of the other, but if unknown to the hearer either express to him no thought whatever or some false conception which, for the instant, his mind attributes to the word. Hence no word is intelligible unless, before its present use, it had already been adopted by the hearer as a symbol of the idea which the speaker now endeavors to impart. In written matter where reflection may aid the reader to recall the meaning of the word, or in conversation where if not immediately apprehended it may be explained, it is sufficient that the word be known. But in matter to be spoken, where its full significance must be at once impressed upon the hearer's mind, it is essential that it be not only known to him, but perfectly familiar,—the very word, in fact, which if he were himself expressing the idea would fall spontaneously from his lips. Thus, among words concerning whose correctness there can

be no question the orator is limited to those which are a part of the natural vocabulary of his hearer, and to which he will instinctively attach the meaning they are now intended to convey.

§ 279. Words : Intelligibility : Understood by the Hearer.

In oratory the hearer distinguishes the words of the speaker only by their sound. When clearly and completely uttered, and as completely and clearly received by the ear, familiar and correct words immediately convey the exact meaning of the speaker to the hearer. But where their utterance or their reception by the ear is imperfect or indistinct, either the idea is not conveyed at all, or the pause and effort of the hearer's mind to interpret the defective sound, and discern the intended word and its significance, interrupts the course of thought and seriously impairs its force.. The intelligibility of words in oratory thus depends largely on the ease and certainty with which they can be properly pronounced and accurately heard. Many words in our language are not of this character. By the number of their syllables, or the accumulation of weak-sounding letters in one portion of the word, especially in the last syllable, or the conjunction of letters so diverse that the voice with difficulty utters one distinctly after uttering the other, or the indeterminate pronunciation which sometimes attaches to a foreign word for years after its adoption into the vernacular, and numerous other causes, these words are rendered almost useless for the oratorical transmission of ideas. Such words should, therefore, be allowed no place in the vocabulary of the orator. Short words, rarely exceeding three syllables, formed of strong letters, easy to utter, certain to be heard,—these are his only serviceable instruments, the sole vehicles which are sure to carry his unadulterated thoughts into the ears and minds of his hearers.

§ 280. Words : Attractiveness : Appropriate Sounds.

Words when intelligible communicate ideas, but something more than the mere apprehension by the hearer of the speaker's thought is necessary for the purposes of oratory. Intelligible words do not of themselves excite attention, awaken interest, or attract the hearer toward the speaker and his cause. There is a charm in certain words derived from other sources than their correctness and familiarity, a charm which all true poets know how to employ, and which, though heightened by the intonations of the speaking voice, results from the construction of the word itself, the collocation of its sounds, the vividness with which it pictures its appropriate idea. Such are the words whose sounds imitate the action or the object they describe, whose soft notes soothe, whose vigorous tones arouse, whose rapid utterance portrays the onward rush of feelings or events, whose measured cadences express the pause and calm of triumph and repose. In these words the common language of our people is peculiarly rich. The great poets and many of the prose writers of the century abound with them, and by their use have given to their word-paintings an energy and impressiveness scarcely less intense than if the scenes and incidents which they depict had been presented to the reader's eyes. Such words always attract attention when appropriately used. They are pre-eminently the natural language of the human race. They strike the mind as the die falls upon the waiting gold, and coin it into the image and the likeness of his whose thoughts they represent. They cause to live anew within the hearers not only the ideas but the emotions of the speaker, and constitute the instruments by which eventually he bends their wills to his. But while in every oration such words should be employed in preference to others whenever strong impressions are to be created, no oration should be composed of these alone. The strain alike upon the speaker and the hearer would be unendurable, and in the inevitable reaction

the force of the idea and its expression would be dissipated. When the perceptive faculties of the hearer are addressed, as in simple statements of fact, or in the definition of the matters in dispute, or the discussion of abstract rules and principles, where the sole object of the speaker is to be clearly understood, a diction which does not arouse the feelings of the hearers is safer for himself and more acceptable to them, reserving for those parts of the oration, which are intended to excite emotions and direct the will, his stimulating thoughts and glowing words. But even in these tamer portions of his speech no mean or vulgar terms should ever find a place, for those to whom they are not unfamiliar in reading and in conversation are no less repelled by them, when they manifestly violate the dignity of the occasion or the orator, than those whose ordinary language is cultured and refined.

§ 281. **Words : Attractiveness : Synonyms.**

The most attractive words soon lose their power when frequently repeated. Yet in oratory no idea of any value or importance can be sufficiently impressed upon the hearer by a single statement. It must be again and again presented to him in order that his grasp upon it may be perfect and secure, and that it may operate with all its energy upon his mind. To do this without using the same words requires an adequate and familiar knowledge of groups of synonyms which can be interchangeably employed, thereby multiplying forms of expression while the thought remains the same. Of these also, in our language, there is no deficiency, scarcely any word in ordinary use being destitute of parallels which can be substituted for it without altering the sense ; while in those rare cases where no exact synonym exists phrases of identical significance are easily constructed. So much attention has been paid to the collection of these synonyms by careful and authoritative writers, that the orator has only to avail himself of their results in order to become supplied

with words of such variety that his necessary iterations of the same idea need never become tedious to his hearers.

§ 282. Words : Attractiveness : Acquisition of Attractive Words.

The duty of acquiring a vocabulary of intelligible words is common to all persons who undertake in any manner to communicate ideas ; that of acquiring a store of attractive words pertains especially to the orator and poet, yet more to the former than the latter since in speaking the operation of the words is only momentary. This acquisition is the result of practice rather than of study, of the selection from his treasury of intelligible words of those whose sound renders them available for his peculiar purposes, and the constant use of these in conversation, in audible recitation, and in public, until the mind instinctively employs them in expressing its ideas. Narrow as are the limits within which the orator thus confines himself, they are wide enough to have served his famous predecessors of every race and age, and will supply him with all the verbal ammunition which his needs require.

CHAPTER II.

OF THE COLLOCATION OF WORDS INTO SENTENCES.

§ 283. Sentences: Intelligible: Attractive.

In the collocation of words into sentences the same objects are sought as in the choice of the words themselves. To a great extent the intelligibility and attractiveness of sentences depend upon the words of which they are composed. But to the arrangement of the words within the sentence much of its effectiveness is also due; the force and value of each word, as well as of the ideas which the united words express, being capable of indefinite augmentation or decrease by the order in which they are presented. A sentence is the expression of a single thought, or of an indivisible cluster of thoughts which is intended to make a complete and independent impression on the mind. The words wherein these thoughts have been embodied are often capable of numerous collocations, any of which would be sufficient to communicate the thought, but there is always one which above all others will render it intelligible and attractive to the hearer. The discovery and employment of this one perfect arrangement is thus a labor to be performed with the same diligence, and attended with the same advantage, as that already expended on the selection of its words.

§ 284. Sentences: Intelligibility: Clearness.

The primary requisite to the intelligibility of a sentence is its clearness. Every sentence consists of a subject and a predicate, with such qualifying phrases as are necessary to define the subject or to limit the application of the predicate.

When the words of a sentence are so selected and arranged that these relations between the predicate and subject are correctly and completely stated, in such a manner as to be instantly apprehended by the hearer, the sentence is clear; otherwise, it is more or less ambiguous and confused. Clearness in these respects is essential to intelligibility; for if the mind of the hearer fails to perceive the nature of the subject or the predicate, or the mode in which or the conditions under which the latter is affirmed of the former, the meaning of the speaker is lost, and his effort to communicate his thought has been in vain. To secure clearness in a sentence its language must, in the first place, be precisely coextensive with the proposition it embodies. Its words must be correct and numerous enough to express fully every element in the proposition, while every word which does not aid in the disclosure of its meaning must be excluded. Ellipsis, or the omission of a word or phrase to be supplied by the reader or hearer, if ever justifiable in any composition, is not permissible in oratory. The hearer has an occupation quite incompatible with that of perfecting the incomplete sentences of the speaker, and it is, therefore, the duty of the speaker to insert into his sentences every particle and pronoun which can make his proposition more immediately intelligible to the hearer. In the second place, the arrangement of these words must be simple. The subject and predicate must occupy the most prominent positions, and qualifying phrases must be placed in close proximity to those whose meaning they are intended to limit or define. When several qualifying phrases are employed, describing different attributes or conditions of the subject or the predicate, that which denotes the nearest attribute or most essential condition should hold the same position in their verbal presentation. Thus, for example, time, place, instrument, and method are conditions or attributes of an act, and with the act method is more intimately connected than instrument, and instrument

than place or time ; and consequently each should be stated in the same relative position to the statement of the act. Moreover, where the customary usages of the language will permit, these qualifying phrases should precede the predicate or subject, and that one be first in order which is naturally most remote. In this manner the mind of the hearer is easily led from the general to the particular, his impressions become more intense as the principal elements of the proposition are approached, and his entire attention is concentrated on them when they are at last expressed. Whether the subject or the predicate should occupy the earlier portion of the sentence depends upon the character of the idea to be conveyed, and the attitude of the hearer's mind toward the elements of which it is composed. To give the predicate the first position always renders a sentence more striking and emphatic ; and where the hearer is already so familiar with the subject as to apply the predicate to it at once without waiting for it to be mentioned, this arrangement is also conducive to clearness. But where that of which the predicate is to be affirmed is as yet unknown to him, the meaning of the sentence is more quickly grasped if the subject be first indicated and described.

§ 285. Sentences: Intelligibility: Unity.

The second requisite to the intelligibility of a sentence is its unity. Unity consists in the restriction of the sentence to the expression of a single idea, or one indivisible cluster of ideas. Every proposition which is capable of complete and independent statement should be embodied in a distinct sentence, and never be incorporated into another, either as an addition, or in the form of a parenthesis. The division of a discourse into sentences, and the pause at the end of each sentence, are intended not merely to afford a rest to the speaker, but to provide an opportunity for the hearer to assimilate the thought just uttered by the speaker, before its

successor is ~~announced~~. To present to him two separate ideas at once, to be ~~together~~ apprehended and absorbed, tends to impair the intelligibility of both, unless the sentence thus constructed is so pronounced in speaking as to distinguish one thought from the other by proper pauses and inflections of the voice, in which case, however written and punctuated, the sentences as spoken are distinct. But to trust to the inspiration of the moment thus to divide a single sentence is never prudent. When the sentences are composed they should be made fit for utterance by bringing each to a perfect close. The brevity so essential to their comprehension will thus be secured, and the orator will avoid the danger of obliterating one impression from the mind of his hearer by crowding upon it another in the rapid vehemence of his delivery.

§ 286. Sentences: Attractiveness: Strength.

The attractiveness of sentences, and their consequent power to enchain attention and awaken impulse, depends upon their strength and harmony. As words are strong in proportion to the vividness with which they picture ideas to the mind, so sentences are strong whenever the arrangement of their words accomplishes the like result. Strength is attained by the omission of redundant words and ornamental phrases, by the exclusion of trivial and unnecessary incidents and qualifications, by avoiding the repetition of the same idea in other words of the same sentence, and by the judicious use of particles. Strength is increased by placing the principal words where as pronounced they will be most impressive, by arranging the members of the sentence in a progressive order from the weaker to the stronger with the strongest last, by inserting qualifying phrases at the beginning or in the middle of the sentence rather than at the end, by making antithetic sentences alike in language and construction, and by closing every sentence with an important and emphatic word.

§ 287. Sentences: Attractiveness: Harmony.

Harmony, though especially desirable in spoken sentences, is not without its value in those intended only to be read. The delight with which the works of certain authors are perused, and the ease with which their ideas are apprehended, are due in no small degree to the smoothness and rhythm of their sentences, as if they were addressed to some interior sense of hearing as well as to the eye, and thus with doubled energy impressed their ideas on the mind. This incidental excellence, which harmony supplies to written compositions, indicates its paramount importance in every form of oratory. It alone renders a pleasing and effective delivery possible, for neither sweetness of tongue nor grace of gesture can make a harsh and halting sentence welcome to the ear. So well has this been understood by the great orators of every race, and with such docility have they pursued the method of framing sentences which it requires, that many of their most famous passages are as truly metrical as any verse that poet ever sang. To harmony of sentences attractive words are, of course, indispensable. To arrange these in such a manner that each shall flow smoothly into its successor, without the loss of a single note or an abrupt transit from one intonation to another; to combine them into musical groups exhibiting the various accents and inflections of the human voice; to build them into sentences whose measure hastens or loiters with the stream of thought; to terminate each sentence with some strong, sweet sound which leaves the ear reverberant with melody,—these are the means by which the poet and the orator alike seek to make real to other men those glowing images, or impassioned thoughts, by which their own ardent souls are irradiated or inflamed. One license is permitted to the poet's harmony, however, which is forbidden to the orator. The sounds and measures of the poet may be constantly repeated, and in this repetition resides for many ears the charm of song. But such monotony in an

oration would be intolerable. It is opposed to the fundamental theory of oratory as a spiritual force urging both speaker and hearer toward a predetermined end. The incessant changes in idea and impulse through which this spiritual energy manifests itself demand a corresponding variety in the sound and rhythm of sentences, as well as in the words of which they are composed ; and this must be secured, if necessary, by such a rearrangement of the thoughts that, while their fitting sounds and measures are retained, the undesirable monotony may be avoided. But never should the intelligibility of a sentence be sacrificed to either strength or harmony. Sweet and sonorous as may then be its tones, it becomes a dead language to the hearer, and, whatever it may be to him as music, it is no longer oratory.

§ 288. Periods: Construction.

A period is a group of sentences connected in meaning by their relation to a common subject, and of which the complete significance does not appear until all are concluded. Each subdivision of the matter under discussion usually constitutes the subject of a period. Like a sentence, a period should be characterized by clearness, unity, strength, and harmony ; and by the same methods are these qualities in each case attained. A period should begin with a short sentence, in which its general subject is disclosed, and terminate, if possible, with one exceeding those, which have preceded it, in harmony and strength.

§ 289. Sentences: Facility in Constructing: how Acquired.

The ability to collocate words into perfect sentences is acquired by the study of good examples, by practice in composition, and by reading aloud. Of speakers and writers whose sentences possess clearness and unity many are now accessible to every reader, and with one or more of these the

orator should make himself so familiar that by an unconscious imitation of their methods his own sentences may gradually attain the same degree of excellence. Practice in writing fixes the good habits thus developed, enables him to purge himself from his remaining faults, and often to improve upon the models he has followed. Reading aloud cultivates not only the ear, but also those faculties whose exercise gives to his sentences their strength and harmony. The audible recitation of blank verse soon lends to all the discourse of the reciter a smooth and rhythmic flow, and the declaimer of great orations, in the original language of their authors, acquires with little other effort their graphic and commanding style.

CHAPTER III.

OF THE CONSTRUCTION AND USE OF RHETORICAL FIGURES.

§ 290. Figures: their Utility.

Figures are forms of speech in which the ideas of the speaker are presented to the hearer, not as they are precisely apprehended by the intellect, but colored by the fancy or intensified by the emotions. These figures enter into the natural language of mankind, and characterize the discourse of every savage and primeval race. When appropriate, they multiply methods of expression, and bestow dignity and beauty both upon the subject and upon its discussion. They become necessary when noble and stirring thoughts are to be communicated, when passions are to be aroused, or when important truths are to be repeatedly asserted. In a calm statement or a rigorous demonstration they are out of place, as also in narrating insignificant events, while in conditions of extreme emotion the images which prompt them vanish from the mind, and voice and thought return together to the simpler modes of utterance.

§ 291. Figures: Classes.

Figures have been divided into those of thought and words. Figures of thought occur when, though the substance of the idea is unchanged, its complexion in the speaker's mind is altered, and in this new attitude, arrangement, or apparel it is represented to the hearer. Figures of words consist either in using words in artificial meanings more or less analogous to their ordinary interpretations, or in their use in their true sense, but intentionally, though not

holds him in suspense, intending to exhibit to him at a later period an object very different from that which he expects ; (24) Preterition, where he affirms that he will not disclose what he forthwith describes ; (25) Reticence, where in the midst of his discourse the speaker interrupts himself, and passes to another subject, as if he feared to explain further, or has more to tell than he is able to relate ; (26) Correction, where he reproves himself for not having spoken better than he has done ; (27) Postponement, where, after partly considering a subject, he puts off its further discussion to a subsequent part of his oration ; (28) Periphrase, or the statement in a circuitous mode of matter whose more brief expression would be harsh or vulgar ; (29) Antithesis, where ideas are placed in opposition to each other in order more clearly to illustrate their elements and differences ; (30) Paradox, where two contrary attributes are affirmed of the same subject ; (31) Comparison, where the resemblances of objects are depicted in order to explain or elevate or deprecate one by the other ; (32) Allusion, where one matter is suggested by another which is actually described ; (33) Gradation, where the thought gradually ascends or retrogrades from one subject to another ; (34) Epiphoneme, where the speaker closes a period or an argument with a short and striking sentence, in which he sums up the substance or conclusion of what has previously been said.

§ 293. Figures of Words: Artificial Meanings: Metaphor.

The principal figure which consists in the employment of a word in an artificial sense is the metaphor. A metaphor is an expression imputing to one object the name or qualities of another, — as to call a brave man a lion, a crafty man a fox, a capricious and spiteful woman a cat, or to speak of the mantle of sleep, a cloud of witnesses, or the rapidity of thought. This figure is founded on the apparent resemblance between the thing whose name or attributes are men-

tioned and the thing to which they are applied. It is the most useful and available of figures, enabling the imagination to lay hold of abstract subjects, and clothing sensible objects in pleasing and impressive forms. Every language possesses multitudes of metaphors, consecrated by long usage, and supplying modes of expression for which there is no equivalent. Metaphors never should be drawn from disagreeable or vulgar objects, even though it is the purpose of the speaker to disparage that to which he applies them, nor should the resemblances on which they are based be too remote, nor should they be pursued so far as to become tiresome or distract attention from the current of the thought. Metaphors should be suited in their general character to that of the discourse, neither too grave nor too gay, never extravagant nor puerile. A metaphor once commenced should be completed without the introduction of unfigurative language or of a different metaphor. Either of these admixtures tends to produce confusion; that of mixed metaphors is also frequently ridiculous, as if a speaker should proclaim, "The hand of Providence has smiled upon us"; or, "The flag of freedom burns above our heads."

§ 294. Figures of Words: Artificial Meanings: Allegory: Metonymy: Synecdoche.

An allegory or parable is an extended metaphor, in which the acts or conditions of one object are suggested by describing those of another. This figure is permissible even in oratory, if its meaning is clear and it is not too protracted. It is useful as furnishing examples to illustrate an argument, and sometimes serves to prove the speaker's claims by an appeal to the consciousness of his hearer. When skilfully related, it always excites the interest of an auditor, and remains in his memory long after the more positive assertions of the orator have been forgotten. Metonymy is a figure in which the name of the cause is substituted for that of its effect, as

the Muses for art or letters ; or the effect for the cause, as shade for trees ; or the container for the contained, as cup for wine ; or the sign for the thing signified, as sceptre for sovereignty ; or the possessor for the thing possessed, as "Adams is wrecked" for "the ship of Adams is wrecked"; or the abstract for the concrete, as whiteness for white. Synecdoche consists in taking the genus for the species, as mortals for men ; or the species for the genus, as sword for instruments of warfare ; or a part for the whole, as sail for vessel ; or the whole for a part, as house for door ; or singular for plural, as the Gaul for the Gallic armies ; or the material for the thing made of it, as steel for sword. In this figure, as well as that of metonymy, the substitution of one name for another must either be sanctioned by common usage, or the meaning of the orator must be so clear that it will be immediately apparent to the hearer.

§ 295. Figures of Words: Natural Meaning: Ellipsis: Hyperbaton: Syllepsis: Pleonasm.

Of the four figures of words employed in their natural meaning, three are of little use in oratory. These are the Ellipsis, which suppresses words whose presence is required by the grammatical construction ; Hyperbaton, which transposes the grammatical order of a sentence, and is rarely permissible except in poetry ; and Syllepsis, in which the words convey a different idea from that which properly belongs to them, or do not accord with the construction of the sentence taken as a whole. All these figures tend to create obscurity, and therefore are to be avoided by the orator. The fourth, or Pleonasm, is, on the contrary, of great value. This consists in the repetition of the idea just uttered in other and more forcible words, enlarging and intensifying the impression already made ; as, " He struck him, struck him with his own hand, with his own parricidal hand."

§ 296. Figures of Words: Oratorical Figures.

In addition to the foregoing figures there are others peculiar to oratory, and hence known as oratorical figures. Of these the most useful is Repetition, which is intended to add force and point to an assertion. It has several forms. One repeats the principal word in each member of the sentence; a second repeats the last word in each member of the sentence; a third repeats both the first and the last word in each member of the sentence; a fourth repeats the same word but with some slight variation in its form or meaning; a fifth commences successive sentences with the same words; a sixth ends successive sentences with the same words; and a seventh begins and ends a sentence with the same words. Another figure consists in the omission or insertion of conjunctions, the former making the movement of the speech more rapid, the latter rendering it more impressive. In another, many words in the same sentence are derived from the same root. Another arranges words successively according to their degrees of force or feebleness, creating a climax or an anti-climax. Another brings together words of similar or diverse sound.

§ 297. Figures in Forensic Oratory.

In forensic oratory figures are employed most frequently for the exaggeration or extenuation of the matters in dispute. One mode of exaggeration is to express the matter by a stronger term than naturally belongs to it; as to call a man-slaughterer a murderer, or a simple hurt a wound. A second mode is to compare the matter with another known to be of great importance, and assume or demonstrate that the present one exceeds the other. A third mode is to dilate on the grave character of something evidently less grave than the act or thing in question; as by expatiating on the enormity of an assault in order to display the heinousness of wilful homicide. The first mode is appropriate in any part

of the oration ; the second and third are proper in the argument and peroration. Extenuation follows the reverse of these methods.

§ 298. Acquisition of Figures.

The acquisition of a sufficient stock of rhetorical figures is a work of much less difficulty than that of distinguishing them from one another, and judiciously selecting them for use. They are frequent in our literature and conversation. The Bible, the great poems and orations with which every student is familiar, abound with them ; and, imitating these instinctively, every one employs them without becoming conscious that he has departed from a simple and unornamented mode of speech. But to render them available as instruments of oratory, the recognition of their characteristic attributes and adaptations is essential. In this respect the training of the orator is not unlike that which develops the schoolboy, with unsteady eyes and rapidly revolving fists, into the pugilist skilled in the manly art of self-defence. His discipline consists in searching out these figures as he reads, noting their differences in purpose and effect, examining the modes in which they are applied by model orators and poets, detecting errors in their use or construction, and inserting them into his own compositions in various ways and forms in order that the most effective may be finally selected. By this method he will at last arrive at such a command of these resources that the best words and figures will furnish themselves to him as he requires them, and nothing will escape his lips in which both force and elegance are not combined.

CHAPTER IV.

OF STYLE.

§ 299. Style Defined: Concise or Diffuse.

The construction and use of sentences and rhetorical figures determine the style of the composition in which they are employed. No style can be commendable that is not clear, correct, natural, dignified, and harmonious; but within these limits its character depends in part upon its copiousness, or the quantity of words used in expressing the ideas, in part upon its ornamentation by rhetorical figures, and in part upon its energy, or the impressiveness with which, through the use of proper words and figures, the ideas are conveyed. Style, as to its copiousness or quantity, is either concise or diffuse. A concise style communicates ideas in the fewest possible words, and introduces no rhetorical figures, or only such as add force rather than grace to its assertions. A diffuse style indulges in an unrestricted flow of words, presents the thought in many different aspects, and clothes it with all available and appropriate ornaments. Carried to an extreme, each of these styles becomes objectionable; too much conciseness producing undue brevity, with its consequent harshness and obscurity; too much diffuseness rendering the entire sentence weak and unimpressive. When properly employed, each is adapted to certain species of compositions. A concise style is suited to descriptive writing, which best accomplishes its purpose when a few striking features are portrayed; to didactic, where the precision with which the idea is expressed measures its apprehension by the hearer; and to pathetic, where the transient heat of excited passion is dissipated if the idea is kept too

long before the mind. A diffuse style is required in argumentative productions, where repetition and examples are necessary to explain and enforce the demonstration ; in persuasive, where new impulses are to be continually aroused to operate upon the will ; and in narrative, where actions and events are to be delineated in detail with their attendant circumstances and effects. In oratory a style more or less diffuse is indispensable, in order that the auditor may fully comprehend the meaning of the speaker, although pathetic and descriptive portions must, for the reasons above stated, be as much as possible condensed.

§ 300. Style : Dry, Plain, Neat, Elegant, Flowery.

Style, as to its ornamentation, has been classified as dry, plain, neat, elegant, and flowery. A dry style discards all ornament, and aims only at being understood. It is appropriate in purely didactic composition, but is never acceptable to a reader unless the matter discussed is of grave importance, and the language is correct and clear. A plain style possesses very little ornament. It seeks to combine liveliness and force with the clearness and precision of the dry style, and is suited for ordinary descriptions, and the merely formal parts of a discourse. A neat style admits of moderate decoration. Its brief, clear sentences, free from superfluous words, contain short and striking figures, and close with an harmonious cadence. This style is adapted to any species of composition. An elegant style requires copious but appropriate ornamentation, great clearness and richness in its words, and strength and harmony in its sentences. No rhetorical graces that are consistent with the nature of the subject-matter are excluded from this style, which is the highest form of literary art. A flowery style is characterized by excessive ornamentation, inconsistent either with the subject or the occasion. It is always a violation of good taste, although a common fault with inexperienced writers.

§ 301. **Style: Simple, Moderate, Sublime.**

The energy of style is its power to move the feelings and will, as well as to communicate ideas, and depends upon the measure and the method in which it combines the two preceding attributes of quantity and ornamentation. A style at once concise and dry possesses little or no energy, but rather chills and repels the hearer, unless the ideas which it conveys are sufficiently interesting and important to render any clear expression of them acceptable to him. An elegant and copious style attains the opposite extreme, exhibiting whatever energy the speaker or his thoughts are able to exert upon the impulses and volitions of his hearer. Style, as to its energy, is simple, moderate, or sublime. In a simple style the speaker is, and seems to be, occupied entirely with the current of his thoughts. He abandons himself to the natural flow of words which they suggest, and makes no visible effort to create strong impressions. While his language is copious enough to render his meaning intelligible, and is often spirited and forcible, his figures are few and commonplace, and couched in easy and familiar phraseology. In this style are thus united the plain and the concise, although the latter attribute yields to its opposite whenever a greater quantity of language becomes necessary in order to the complete conveyance of the thought. Although this is the most difficult style to acquire, yet such is its consummate art that the hearer always feels as if he would himself have spoken on the subject in the same manner as the orator has done. This renders it pre-eminently effective for oratorical purposes, since it puts the auditor in good humor with himself as well as with the speaker, and concentrates his interest on the thoughts which are presented to him. It is, therefore, the style especially adapted for instruction and argument, for the narration of less important facts, and for the discussion and explanation of abstract principles and rules. A moderate style combines the neat with the concise or temperately dif-

fuse. Richer in ornament than the simple style, and employing all the figures of words and most of those of thought, it nevertheless subordinates its language to the thoughts expressed, and makes no apparent effort to arouse the emotions or to sway the will. Its manner is sweet and calm, its diction polished and ingenious, its wit brilliant and graceful, its utterance harmonious and strong. Its office is to interest and please. It is suited for long and exact discussions, which, if conducted in the simple style, would become wearisome ; for common topics where no vehemence is to be displayed ; and for all parts of an oration which are intended rather to conciliate than to persuade. A sublime style is the union of the elegant with the diffuse, or in pathetic passages with the concise. It is profuse in ornament, majestic in the strength and harmony of its sentences, splendid in its diction, impetuous and overwhelming in its assertions and appeals. It is adapted to few subjects, is appropriate only when the thoughts of the speaker and the mental condition of the hearers justify its use, and cannot be long sustained without exhausting the speaker and producing a revulsion of feeling in the hearer. When employed, as it must be where a direct attack is made upon the feelings and volitions of the auditor, the ideas which it expresses should, therefore, be interspersed with others which can be conveyed in a less energetic style. For true eloquence, whether in speaking or in writing, requires not only that the style should suit the subject, but that various subjects with their proper styles should so alternate that the mind of the hearer or the reader will be ever on the alert, and be as constantly experiencing new emotions as he is receiving new ideas.

§ 302. Style of Oration: Propriety.

The style of an oration must be appropriate to the hearer, the occasion, and the subject. As the sole purpose of oratory is to move the will of the hearer, and as the value of

any style in oratory resides in the assistance which it renders in producing this effect, the final test of a good style in oratory must be found in its appropriateness to the hearer. To a cold, self-contained auditor, no subject however important, no occasion however impressive, will make acceptable the gorgeous rhetoric and vehement delivery of the sublime style, and if it does not excite his wonder at the extravagances of the orator, it is certain to inspire him with suspicion or disgust. On the other hand an audience of impulsive, generous, imaginative natures will be attracted toward and controlled by him in proportion as his style approaches the sublime, no matter what may be the subject or occasion. In determining the style of an oration, the character and attitude of the hearers is thus first to be considered, and that style adopted which is likely to be most acceptable to them. Next to this primary direction, the style must be determined by the occasion. In discussing any subject, social, political, or religious, before a limited audience and on an informal occasion, a style would be bombastic and ridiculous which, in a set oration to a vast assemblage and on some great festival, would be both proper and effective. No sagacious statesman carries into the village caucus the florid rhetoric with which he adorns the public platform and the legislative hall, no powerful preacher echoes in the household prayer-meeting the thunders of his pulpit, although on both occasions the topics and the purposes of the orations may be the same. Regard to the occasion, therefore, must precede that to the subject, and the style be chosen as it may demand. The requirements of the hearer and the occasion being satisfied, the character of the subject furnishes the remaining indication. When of no special interest except to the intellect and judgment, a simple style should be adopted. Where it possesses moral qualities which ought to operate somewhat, though not intensely, on the feelings, the moderate style is suited to its presentation. When it

appeals directly and supremely to the heart and will, the style must, in some passages at least, become sublime.

§ 303. Style in Forensic Oratory.

To the advocate the same variety of subjects, hearers, and occasions is presented as to any other class of orators, and the style to be adopted for his speech, in any given case, must be determined by the same considerations. In the great majority of cases it is doubtless true that the jury is composed of men of average temperament, that the occasion, although dignified, is rarely solemn, that the subject, even when pecuniarily important, is in its nature insignificant, and therefore that a simple, or at best a moderate style, is most appropriate. Still there are also cases where the decision of the issue involves tremendous consequences, where the occasion is only less momentous than those on which the fates of nations hang, and where no style but the sublime could satisfy the instincts of the hearers, or with proper energy communicate the advocate's ideas. No universal rule concerning style exists in reference to forensic or to any other form of oratory, except that it must be appropriate; and that when the character of the hearers or of the occasion affords no better guide, the simple style should be employed in proving, the moderate in pleasing, and the sublime in all direct attempts to rouse the feelings and control the will.

§ 304. Style: Acquisition of.

The acquisition of these different styles, and of wisdom in selecting and combining them, is effected by studying good models and by constant practice in writing. In the still unsurpassed orations of antiquity, some of which are familiar to almost every schoolboy, are found examples of elegance in diction, of strength and harmony in sentences, and of the proper use of nearly every figure and device of rhetoric; and though to one who reads them in translations their verbal

excellence and sweetness are in a great measure lost, enough is gained to make their constant study a most profitable labor. The want they leave unsatisfied should be supplied by the great Anglo-Saxon advocates and orators, whose legislative and forensic speeches exhibit every art and grace of language, and rival the renowned productions of the ancient world. To make the treasures thus unveiled his own, and so incorporate them into his habitual speech that they will fall spontaneously from his lips whenever an occasion for their use arises, practice in writing, according to the lessons taught him by those examples, is essential to the advocate. "If what is meditated and considered," says Cicero, "easily surpasses sudden and extemporary speech, a constant and diligent habit of writing will surely be of more effect than meditation and consideration itself, since all the arguments relating to a subject, whether suggested by art or by a certain power of genius and understanding, will present themselves and occur to us while we examine and contemplate it in the full light of our intellect; and all the thoughts and words which are the most expressive of their kind must of necessity come under and submit to the keenness of our judgment while writing; and a fair arrangement and collocation of the words is effected by writing in a certain rhythm and measure, not poetical, but oratorical. These are the qualities which bring applause and admiration to good orators; nor will any man ever attain them unless after long and great practice in writing, however resolutely he may have exercised himself in extemporary speeches." And Quintilian asserts: "In writing are the roots, in writing are the foundations of eloquence. By writing resources are stored up, as it were, in a sacred repository, whence they may be drawn forth for sudden emergencies or as circumstances require." No better subjects for such practice can be found than the orations which he studies as his models. To prepare sketches of these, preserving all the ideas of the orator, but rejecting his words, and around such

skeletons to build orations of his own, in his own language, with his own figures, elaborating and refining every part until his rhetorical ability can produce no higher perfection of style, and then to compare his work with his models, noting the differences in expression, and correcting his in the light gained by the comparison, gradually transfers their excellences to him and renders them the ready vehicles of his ideas. His practice, however, must on no account be limited to the productions of one orator, unless it is his aim to discipline himself into a servile copyist, rather than to acquire the virtues and the powers of all his predecessors.

BOOK III.

OF ARRANGEMENT.

§ 305. **Arrangement: its Importance.**

With the act of expression the orator completes the preparation of the materials to be employed in his oration. It then remains for him to present them to his hearers in a manner adapted to produce the desired impressions on their intellects, impulses and wills. The first step in this process is the act of arrangement, or the disposal of these materials in such succession that each idea may derive additional strength and clearness from those which precede and follow it, and that the oration as a whole may be progressive, energetic, and harmonious. This due arrangement is of supreme importance in all spoken compositions. Without it, the more numerous and forcible are the thoughts expressed by the orator the worse are the confusion and perplexity into which the hearer is precipitated ; his first impressions are obliterated by later ones, which should have fortified and deepened them ; the central point of the oration is obscured by others to which equal prominence is given ; and its purpose thwarted by the very agencies which, if wisely handled, would have assured success. Without it also the orator finds himself embarrassed by the very wealth of his accumulations ; his ideas crowd together in his mind ; their connections and relations disappear ; he is in doubt where to begin and where to close ; and even if he finally communicates all he sought to utter, he is never certain that he has produced upon the hearer the impression he intended, or done any credit to himself or to his theme. The contrast, both to lis-

tener and speaker, between orations delivered on the spur of the moment by men whose habitual methods have not been already formed according to the rules of oratorical arrangement, and orations delivered by the same persons on the same subjects after reflection and comparison have enabled them to express their thoughts in proper sequence, affords the most conclusive demonstration of the importance of this step in the art of oratory.

§ 306. **Arrangement: its Method.**

A perfect oration consists of four parts, arranged in the following order: (1) The Exordium, or Proem; (2) The Statement and Partition; (3) The Proof and Refutation; (4) The Peroration. No oratorical effect can be produced upon the mind of a hearer unless the purpose of each of these parts thus arranged is in some mode accomplished. When, therefore, he depends entirely on the oration for such effect, every part must be present and completely occupy the field to which it is appropriated. But when he has derived from other sources some of the impressions which one of these parts is intended to create, it may be correspondingly curtailed. Thus in forensic oratory, if all the facts bearing upon the controversy have been presented to the jury by the testimony, or in preceding arguments, the advocate may properly confine his statement to a mere allusion to them, where otherwise they must have been recited in detail. Still, even in such cases, each of these parts must to some extent appear, and the sequence of the thoughts and their impressions be preserved.

CHAPTER I.

OF THE EXORDIUM.

§ 307. **Exordium: its Necessity.**

The use of an exordium is dictated both by nature and by custom. Every discourse, which has a fixed purpose in view, begins with a remark intended to prepare the hearer for the request or demand that follows ; and this occurs as uniformly in spontaneous appeals as in those deliberately formulated according to the rules of art. An abrupt commencement, seizing as by force the attention of the hearer, and constraining him to listen, inevitably arouses his instinct of self-defence, and alienates him from the speaker. Only when an oration is one of a series of circumstances operating to the same common end, and is so linked with those which have preceded it that they perform the office of an introduction, should the formal exordium be omitted ; and even then some fitting sentence should lead the mind from what has been declared or done to the propositions which are now to be submitted.

§ 308. **Exordium: its Purposes.**

The purposes of an exordium are three : (1) To conciliate the hearer ; (2) To attract his attention ; (3) To interest him in the subject of discussion. It is the aim of oratory to take possession of the auditor in his condition of indifference or hostility, and guide him into a state of active favor and co-operation. The possession which it takes, the guidance it affords, can never be effective if the auditor perceives that they are being forced upon him by the orator, and that an attempt is being made to override his judgment or his will.

What the orator must seek and must obtain, before he can advance one step toward his end, is the voluntary but unconscious surrender of his audience to his direction and control ; and this he can secure only by creating in them a friendly and confiding disposition toward himself, and toward those whose interests or positions are identified with his. Again, as the reception and comprehension of ideas depend upon the attention which the hearers devote to their statement and explanation by the speaker, it is essential that their minds should be withdrawn from other subjects and concentrated upon that which is to be submitted to their judgment. And finally, since the measure of their attention and the completeness of their self-surrender are to a great extent determined by their own desire to understand the subject, and to ascertain what action concerning it their duty or their welfare may require, the orator must at the outset excite this desire, and give them reason to anticipate its speedy gratification. All these purposes it is the office of the exordium to serve. To these its thoughts, its language, its style, and its delivery are exclusively directed, and when it accomplishes these it becomes the most important and effective part of the oration, not yielding even to the peroration or the argument in the measure of its influence upon the ultimate decision of the hearer. In forensic more than in any other form of oratory is it of inestimable value, for the gulf between the jury and the advocate is wider than that between any other speaker and his audience ; their knowledge of his purpose to persuade or force them to support the claims, to which his own allegiance is pledged, naturally repels and puts them on their guard ; while their acquaintance with the cause, derived from witnesses and previous orators, renders their curiosity less ardent, and their indifferent or hostile disposition more difficult to alter or remove.

§ 309. Exordium: its Subjects.

To effect all these purposes, the subject of the exordium must be embraced in or related to the oration itself. To conciliate the hearers, and attract their attention, it might indeed suffice to commence with any topic which, in itself or by its mode of treatment, could fix their minds upon the thoughts expressed, and establish sympathies between them and the speaker. But the third purpose of the exordium, and not the least important, would then be unfulfilled. The interest and sympathy excited are useful to the orator only when directed toward the object which his entire oration is intended to promote, and this must be accomplished by the same act which excites them, or their favorable influence is dissipated and forever lost. Hence an exordium, taken from a subject commonplace or equally suited to all orations, necessarily fails in every one of its three purposes, and an opportunity is thereby thrown away which can never be again presented. In forensic oratory, the subject of the exordium is derived from the cause at bar or from some of its attendant circumstances. Of such subjects there are always many, and for convenience of selection they may be grouped under the following heads: (1) The client, his character, position, age, sex, financial condition, or the effect of an unfavorable judgment upon him or his family; (2) The adverse party, his power, malice, or meanness; (3) The advocate himself, the motives with which he undertook the cause, as from charity, friendship, or patriotism, his inability to do it justice against such formidable adversaries, or, if he is well known to the jury as a careful and upright man, his own confidence in the righteousness of his claims; (4) The opposing advocates, their experience and skill, their recognized ability to make the worse appear the better reason, and his fear for the result were not the merits of his own side so apparent; (5) The jury, their patience in listening, their prudence in judging, their exalted station, their love of justice, their

fidelity to duty, the effect of the decision on their peace of conscience or their public reputation ; (6) The cause, its importance or difficulties, the state of public opinion and expectation concerning it, the place or time of trial ; (7) Any notable incident of the trial ; (8) Some pertinent assertion or admission in the oration of the opposing advocate. Not more than one of these subjects should be employed, and that one the most useful in view of all the circumstances under which the oration is delivered. Nor should anything be stated concerning which there can be any doubt or denial, nor any accusation made against an adversary unless its truth is evident without argument or proof.

§ 310. **Exordium: Selection of Subject.**

In the selection of a subject for his exordium, the orator should be guided by these considerations : (1) The nature of the claim he is about to urge upon the hearers ; (2) The dispositions of the persons to whom his appeal is to be addressed ; (3) The character and condition of the persons for or against whom he is to speak ; (4) The circumstances attending the oration ; and (5) The prepossessions and prejudices of his auditory and the public. Suitable for the introduction of the principal discourse it must be, for the reasons already stated ; accommodated to the dispositions of the hearers, or it will not excite attention nor awaken sympathy ; adapted to the persons and facts involved, or its apparent inconsistency will thwart the purposes it was designed to serve ; calculated to allay prejudice and stimulate good will, or its conclusion leaves the hearer distant and unmoved. The first impression which in view of all these circumstances it is necessary to make upon the hearer, and the idea whose presentation will most certainly and quickly produce that impression, are here the object of his search, and when discovered constitute the aim and theme of his exordium.

§ 311. Exordium: its Preparation.

It is apparent that no introduction can be properly prepared until the matter to be introduced is fully understood. Hence the rule, that, of all parts of the oration, the last to be composed is the exordium. The reasons for this are obvious and manifold. The substance of an oration is contained in the statement, proof, and refutation. These must necessarily be complete, comprising every thought which forms a portion of the argument. Persuasive energies are exercised in these and in the peroration, and whatever arts the orator may use to stimulate the emotions, and to move the will toward the contemplated act, are there displayed. All the materials that are needed to accomplish the main purpose of the oration are thus absorbed in these substantial parts, and as the exordium must not anticipate but merely pave the way for their discussion, it must be framed from the materials remaining after these are finished. Then for the first time, also, can the orator determine which of all his available materials is fitted to precede the substance of his speech, and lead his hearers to the readiest acceptance of his demonstration and appeal. To compose the exordium in advance commits the orator to a current of thought which colors the entire oration, subordinates its substantial to its formal parts, weakening the demonstration and forestalling the appeal. For the most prominent and valuable ideas which he possesses come first to his mind when he attempts to put his meditations into words, and though these may be indispensable for convincing or persuading, they will almost inevitably escape into his introduction if he first prepares it, and either compel him to repeat his thoughts, or to omit them where they are most useful, or to rewrite his exordium after the other parts have been completed. This last misfortune is not, however, much to be deplored. For no exordium can be too many times rewritten or too carefully revised. Of all parts of a speech it is the one on which the ancient orators expended skill and

labor, varying its ideas and expressions, changing the order of its words, striving in every way to make it catch the ears and win the favor of their hearers.

§ 312. Exordium : its Style : its Delivery.

An exordium should be concise, and its length proportionate to that of the oration. Often a single sentence is sufficient ; and it should never be so protracted as to detain the hearer from the subject of discourse after he is once ready to consider it. Its language must be correct and clear, easy and natural ; its style devoid of ornament, yet lively and pleasing ; its form not argumentative nor energetic, but rather reminiscent or descriptive. Its opening sentence should be short ; its closing one connect it with the statement which succeeds. The delivery of an exordium must be suited to its style. The manner of the orator should be modest, dignified, and calm, free from all affectation or apparent self-assertion ; his utterance slow and quiet, and his gestures few. Departure from this rule is justified when to the highly wrought emotions of the audience some sudden burst of passion is appropriate ; but those occasions are infrequent, and splendid is the genius by which alone they can be adequately improved.

CHAPTER II.

OF THE STATEMENT AND PARTITION.

§ 313. The Statement: its Purpose and Necessity.

The second part of an oration is the Statement or narration, with the Partition in which it naturally terminates. The statement is an explanation of the subject out of which arise the propositions that are to be submitted to the hearers. Its principal purpose is to enable them to comprehend the action which the orator desires them to perform, and the reasons for acceding to his wishes ; but it serves also as a mode of demonstrating the truth of his positions by appealing to their experience and common sense, and by its matter, style, and manner of delivery often exerts a strong persuasive influence. It is necessary even when all the details of the subject are familiar to the hearers, since every subject can be viewed in different aspects, some more and some less favorable to the orator's design, and it is now his object to present them in that aspect which best supports his claims.

§ 314. The Statement: its Subject.

The subject of the statement embraces all the circumstances which can elucidate the questions propounded by the orator, or aid in their determination. In deliberative oratory these circumstances may be numerous, extending over long periods of time, and ramifying into multitudinous details. But in forensic oratory they are confined within the limits of the controversy which the judge or jury are expected to decide. If the issue is of law, those facts to which the legal question appertains alone require to be narrated. When the issue is of fact, the statement covers every incident which renders the

nature of the controversy more apparent, or supports the claims presented by the advocate.

§ 315. The Statement: its Qualities: Truthful.

In order to accomplish its various purposes the statement must be: (1) Truthful; (2) Probable; (3) Favorable; (4) Clear; (5) Brief; and (6) Pleasing to the hearer. Of these, the primary requisite is truthfulness. Nothing can more utterly destroy that unity of thought and feeling between a speaker and his audience, on which his success so largely depends, as to be detected in an endeavor to mislead them. They expect from him a full acquaintance with the facts, since he assumes to discuss them, and an honest statement of them, since he engages in the occupation of instructing others; and when they discover either his ignorance or insincerity, this expectation is not merely disappointed, but is changed into a contempt and indignation which are more potent to defeat his claims than any argument that could be adduced against them. Moreover, his departure from the truth is nearly always made apparent before the controversy is determined. The facts which he narrates are never exclusively within his knowledge; and in reference to every proposition which is open to dispute, he is almost certain to encounter some antagonist who will challenge his assertions, and expose his falsehood. To a forensic orator, an untruthful statement is attended with especial dangers. Not only is his responsibility as an instructor and adviser of the jury increased by his official oath, and the solemnity of the occasion in which he participates, but the immediate tests of his fidelity and honor are spread out before them in the testimony of the witnesses and the results of their own observation, while vigilant enemies surround him to take advantage of his errors. Under such circumstances, to vary from the truth in any item of his statement is worse than folly. On the contrary, the facts which aid him, and the facts which harm him, should

be alike narrated. Disputed facts may be described according to his own idea of their character, but with the admission that a different view is taken by his adversary. Whether the evidence precedes the statement, or is yet to be produced, the jury must be able to perceive, when they compare the evidence and statement with each other, that he has suppressed nothing, and has made no affirmation or denial which their own convictions of the truth do not corroborate.

§ 316. The Statement: Probable.

The statement must not only be intrinsically true, it must be also probable ; that is, it must seem true to the hearers. Where an auditor already knows the facts, a statement which is truthful will, of course, be probable. But where he has not yet discovered them, or has not considered them in their relations to the present subject, his knowledge of them, or of their significance, must be derived in the first instance from the orator ; and it is then the purpose of the orator, not merely to state facts as they are, but by his mode of statement to make his auditor believe that they are as he states them. A narrative seems true when the facts described appear to have occurred according to the course of nature, and as the hearer's own experience would lead him to expect. To give this character to a narrative, such qualities and conditions must be attributed to things and persons as would render them liable to do or suffer what is predicated of them ; adequate causes must be assigned for all events ; sufficient motives must be pointed out for each important action ; and every circumstance of time, place, or occasion calculated to elicit or produce the incidents described must be portrayed. The details of the transaction must be so connected that one prepares the way for, or explains, or corroborates another, and in the recital of disputed points simple, short arguments, based upon general propositions, must be interwoven whenever opportunity is offered.

§ 317. The Statement: Favorable.

Many facts may be made to appear in a favorable or unfavorable light merely by describing them in different language. Others, essentially unchangeable in character and aspect, may by the same method be minimized or magnified, and thus rendered less harmful or more helpful to the cause of the narrator. One purpose of an orator, and particularly of an advocate, is by his statement to give the facts related a coloring favorable to his side of the controversy, without departing from truth and probability. This is accomplished by amplifying and exaggerating matters which support his claims, by condensing and extenuating those which contradict them, by connecting facts apparently adverse with those which qualify their hostile influence, by attributing unlawful actions to an upright motive or referring to some other incident as their excuse or justification. But caution is necessary, lest some manifest overstatement or undue depreciation of the facts arouse the auditor's suspicions that the orator is endeavoring to convey a false impression of the actual transaction. To prevent this, it is often prudent to insert into the statement, from time to time, a frank admission of some unfavorable but not important fact; following this, however, with a vivid presentation of prominent and favorable facts, in order to counteract the bad impressions made by the admission.

§ 318. The Statement: Clear.

Clearness and brevity are the qualities which render a statement intelligible. Clearness requires, here as elsewhere, the use of correct words and properly constructed sentences. Descriptions of persons, acts, and objects must be accurate and complete, descending into details of names, places, dates, and circumstances. The chronological order of events, if possible, must be preserved, and when distinct groups or series of facts, each with its own chronology, are involved

in the transaction, each should occupy a separate division of the statement. Unnecessary repetition is to be avoided. Rhetorical figures which aid the hearer in picturing to himself the occurrences narrated may be introduced, but flights of fancy into other regions create confusion and are not permissible.

§ 319. The Statement: Brief.

Brevity consists in the rapid movement of the narrative, along the salient points in the transaction, from its commencement to its close. It must not, however, be extreme, for a too hurried and succinct description always obscures a subject, and more effectually prevents its apprehension than one too diffuse ; while the effort of the hearer to grasp the fleeting images awakened by the former makes it more tedious to him than the easier though protracted exertion demanded by the latter. A due brevity is not inconsistent with clearness. If minute and trivial incidents are discarded and the narrative is confined to what are really significant, if useless ornaments and digressions are omitted, and no perceptible attempts are made to arouse the feelings of the hearers, the statement will be sufficiently concise, in view of the other more essential qualities which it must possess.

§ 320. The Statement: Pleasing to the Hearers.

The attention and sympathy elicited by the exordium must be perpetuated and intensified by the statement, to which the exordium was but an introduction. For this purpose, the statement must be as interesting and agreeable as the nature of the facts narrated and the style and manner of the orator can make it. Every attractive incident must be displayed at length, and the repulsive barely noticed, or apparell'd in such words as will present them in a tolerable aspect. Impressive or pathetic circumstances must be described in language which awakens the emotions, although appropriate to the

quiet tone of a narrator and not apparently endeavoring to touch the heart. The manner of the orator must be earnest and sincere, varying with the changing scenes which he delineates, expressing the successive feelings which the contemplation of the facts arouses, and thus inspiring the hearer, in that mysterious way which all experience but no one can define, with the same sentiments he seems to entertain.

§ 321. **The Partition.**

The statement closes with a sentence summing up the previous narrative, briefly outlining the great central facts, and submitting them to the hearers as the subject of discussion. Then follows the Partition, the clear and precise enumeration of the topics, into which the subject naturally divides, in the order according to which they are now to be considered. Except in cases where the subject is incapable of subdivision, and consequently presents but one point for examination, such a partition is always necessary. It permits the orator to concentrate his arguments on the exact positions they are intended to support, to avoid apparent inconsistencies in his different claims, and to arrange his proof and refutation in the manner best adapted to sustain his cause. It presents the subject to the hearers in its most intelligible form, and enables them to perceive the bearing and the weight of different proofs and refutations, to distinguish between the important and the insignificant facts, to retain them in their memories, and to apply to them the proper portions of the demonstration. Hence, though occupying so small a space, it is justly regarded as one of the vital parts of the oration. A good partition exhibits the following characteristics: (1) Its members, taken together, exhaust the subject; (2) One member does not overlap another; (3) The members are not too numerous or minute; (4) Each member is clear and brief, and easy to recall; (5) The members are arranged in their natural

order, proceeding from the simplest to the more complex; (6) It separates the admitted facts from those which are disputed, and indicates the mode in which the latter are to be determined. In general oratory, the method of partition depends upon the judgment of the orator. In forensic oratory, its members are the issues and their subdivisions, and its arrangement only is left to the discretion of the advocate. It should in all cases conclude with a connecting sentence, by which the attention is transferred to the next succeeding part of the oration.

CHAPTER III.

OF THE PROOF AND REFUTATION.

§ 322. The Proof and Refutation.

The third part of an oration is the Proof and Refutation, or that array of arguments by which the orator establishes the propositions enumerated in the partition, and overthrows the objections of his adversary. It may be either simple or complex ; simple, when the partition presents a single point ; complex, when several are presented, each of which then requires a separate proof and refutation. This is the very essence of the oration, the part on which success or failure ultimately depends. The arguments of which it is composed therefore demand the highest degree of diligence in their discovery, of ingenuity in their construction, of prudence in their selection, of sagacity in their arrangement, expression, and delivery.

§ 323. The Proof: Discovery of Arguments.

An argument is a deduction of the unknown from the known. Its power to convince a hearer depends upon the certainty with which he knows the known, and the conclusiveness to his mind of the reasoning by which the unknown is inferred from the known. Demonstration by argument thus consists in adopting some fact of which the hearer is certain, or can be made certain, and, by a process of reasoning which he can understand and follow, deducing from it the fact in question. The invention of an argument, therefore, involves two acts : the discovery of the known which is to be the basis of the inference ; the construction of the inference itself. The discovery of the known is effected by

comparing the proposition to be proved with the facts already accepted by the hearer, or which he will accept upon their presentation, and by observing which of these are so connected with the proposition that their existence tends to prove its truth. Such a comparison requires a perfect comprehension of the nature and limits of the debated proposition, an acquaintance with the scope and content of the fact within the hearer's knowledge, and usually a careful and prolonged investigation of their various relations to each other.

§ 324. The Proof: Discovery of Arguments in Forensic Oratory.

In forensic oratory, the nature and limits of the debated proposition are, in most cases, easily discovered. When the proposition is one of law, the known from which it is to be derived comprises all those legal principles and rules bearing upon the question which can be found in recognized authorities. When the proposition is one of fact, the known embraces every fact within the knowledge of the jury, or capable of being brought within their knowledge, from which the proposition or any of its elements could be inferred. The facts within their knowledge are those items of general information which all men possess, phenomena attested by their own sensations, and such details of the cause as are self-evident, or are admitted by both parties, or have been established by uncontradicted testimony. Facts capable of being brought within their knowledge are such as are denied by the opposing advocate and witnesses, but can be demonstrated by further arguments, and such as are derivable from known facts by a necessary inference. Of these two classes of facts the latter are in value and availability far inferior to the former. A deduction from a fact already known to the fact involved in the debated proposition requires but a single mental process, and if the reasoning is apparently correct, the hearer is immediately satisfied that the proposition is true. But

when the fact from which the final inference is to be derived must itself be deduced from some anterior fact, this duplication of the reasoning process readily perplexes one who apprehends it only through the ear, and, however sound the argument may be, it seldom produces in him any certainty of knowledge. Such facts should, therefore, never be resorted to for arguments when others of sufficient strength and number are accessible. Besides the inherent weakness of the arguments which they supply, the time spent in their demonstration, in the collation of the evidence of disagreeing witnesses, and in the trivial discussions to which the consideration of inconsistent testimony leads, diverts the attention of the jury from the main line of argument, and gives it a complexion of subtlety and inconclusiveness which it can ill afford to wear. Therefore, whenever it is possible, the advocate should seek his known facts among those which the jury know already, and their certainty of which cannot be shaken by any contradiction of his adversary. Comparing these with the proposition he maintains, he will, by proper study of their mutual relations, discover from which of them inferences to support the proposition can be drawn.

§ 325. The Proof: Construction of Arguments.

In the construction of arguments two objects are sought: first, that the argument be sound; second, that it be convincing to the hearer. An argument is sound when the deduction is drawn according to logical rules, and is, therefore, impregnable against any attacks of the adversary. An argument is convincing when the hearer comprehends it, and perceives that the conclusion is inevitable. Whether or not an argument is sound is best determined by framing it in syllogistic form, and testing it in the manner already prescribed for the detection of false inferences while collecting ideas. No argument which cannot endure such tests should be employed, for though its weakness may escape the atten-

tion of the hearer, it offers to the opposing advocate a vulnerable point through which a serious injury may be inflicted on the entire demonstration. But a sound argument is not necessarily a convincing one. This latter attribute depends no less upon the mental constitution and attitude of the hearer than on the nature of the argument; and if his crude and defective modes of reasoning do not permit him to apprehend the certainty of the basic fact, and the logical rectitude of the inference which it affords, the argument itself is wasted on him. Hence, in constructing arguments, the method of deduction adopted by the advocate must be that which his hearers are accustomed to pursue, which their own intellects can follow readily as he presents it, and the results of which they will accept as true. No other argument can be an argument to them, nor available for his use upon them; and whenever the known fact cannot be connected by such modes of inference with the fact to be inferred, it deserves no attention, however valuable it might become in demonstrations directed to more cultivated minds.

§ 326. The Proof: Selection of Arguments.

Sound and convincing arguments differ among themselves in strength and value. The strength of an argument manifests itself in the vigor and rapidity with which it operates upon the hearer, and the assurance with which he rests in its conclusion. It depends in part upon the certainty, clearness, and completeness of his knowledge of the known fact, and in part upon the evident correctness of the reasoning processes employed in the deduction. The facts of which every hearer is most certain, and which he most clearly and completely knows, are those which constitute the common stock of human information. These, being universally understood and appreciated, require no explanation, become fully present to the hearer's mind upon their simple statement, and permit the orator to proceed at once with his

deduction. Being also constantly adopted by the hearer as the basis of his own practical inferences, the method of reasoning from them is above all others intelligible and satisfactory. Next in order, in forensic oratory, stand the facts which are admitted by both parties. Although the jury are obliged by this admission to receive them as true, yet never can they have concerning them the same feeling of certainty which those of the preceding class produce. Often too these facts are new and strange, requiring comment or description, which protracts the argument, and thereby diminishes its strength. Inferior to these are the facts established by uncontradicted testimony, for to their other imperfections is added that arising from the doubt whether the adverse party could not have disputed them had he deemed it for his interest to do so. The lowest place is occupied by facts which are left uncertain by the witnesses, and those which rest on previous deductions. Inferences, in their turn, vary in their conclusiveness, some being necessary, others probable, others merely possible. Of these the necessary is the strongest, being not only impregnable but usually self-evident, and carrying instant conviction to the hearer. The probable is strong in proportion to its known probability. The possible is affirmatively weak, though sometimes negatively strong. Uniting these two members of an argument in various combinations, and comparing them with one another, the relative strength of the resulting arguments can be determined. A necessary inference from a fact universally known is the strongest of all arguments, and needs only to be clearly stated to immediately convince the hearer. A highly probable inference from a universally known fact is next in value, outranking even a necessary inference from an admitted fact, since ordinary hearers place more dependence on the fact than on the inference, and are more likely to be satisfied by doubtful inferences from known facts than by certain inferences from facts of which they doubt. Pro-

gressively diminishing in vigor, then follow probable inferences from admitted facts, necessary and probable inferences from uncontradicted facts, necessary and probable inferences from facts disputed or inferred, and, lastly, possible inferences from known, admitted, uncontradicted, and disputed facts. In the selection of his arguments, the advocate, putting himself in the place of the jury and endeavoring to estimate the weight of arguments according to their standards of judgment, should choose only the strong. The weak, and those which are available on both sides of the case, should be rejected; and even of the strong, the number should be small. A multitude of arguments, however forcible, fatigues and overwhelms the hearer, and may create a doubt where certainty before existed. That demonstration best succeeds which urges home upon him a few strong arguments, the strongest which the cause affords, and allows them to do their perfect work upon his mind.

§ 327. **The Proof: Arrangement of Arguments.**

The vigor and efficiency of a series of arguments is very much affected by their arrangement. Strong arguments should be presented singly, and carefully elaborated; and in their application to the debated proposition should be viewed in all their aspects, that the entire advantage derivable from them may be secured. Weak arguments, on the contrary, should never be exhibited in detail, but be massed together, that in the throng their individual deficiencies may be concealed. A cluster of insignificant proofs will sometimes do excellent service, when taken separately they would not be worthy of a moment's notice. The general order in which arguments should be adduced is, first the strong, then the weak, and last the strongest. The weaker arguments never should precede the strong. The impression thus created is necessarily unfavorable, the patience and good will of the hearers are at once diminished, and

their confidence in the advocate and his cause is permanently shaken. Nor should the arguments advance from strong to weak and from weak to weaker, for thus the strong are constantly diluted until the entire series appears destitute of vigor. Strong arguments at the commencement, separately displayed, followed by a solid phalanx of the weaker, and these supported by the strongest of all, give an arrangement which permits the use of every grade of proof, while all the time the demonstration gains in strength and presses forward with accumulated power.

§ 328. **The Refutation.**

Refutation consists in the destruction of opposing arguments. It is a task more difficult than that of constructing favorable arguments, and requires great shrewdness, readiness of invention, and dialectic skill. One of its chief embarrassments arises from the fact that it must often be performed without an opportunity for preparation; an embarrassment from which nothing can relieve the advocate except an acquired ability to detect and expose logical errors, and such a thorough knowledge of his cause, and of the mental habits of his adversaries, as may suggest to him what arguments they will employ, and thus enable him to premeditate a fit reply.

§ 329. **The Refutation: Irrefutable Arguments.**

No direct refutation ever can avail unless the argument attacked is refutable. Some arguments are irrefutable. A necessary inference from a universally known fact cannot be overthrown. In many cases this is also true of necessary inferences from admitted facts, and of highly probable inferences from known facts. The facts cannot be denied; the deductions cannot be disputed. It is therefore useless to attempt any direct refutation. Such arguments must either be passed over without notice, and the efforts of the advo-

cate be devoted to enhancing the vigor of his own proof in the hope thus to overcome them, or their point must be turned with an anecdote or joke, or the force of the conclusion be diminished by freely admitting its general truth, but pointing out that to the present question it does not apply. When to employ these various methods of meeting an unanswerable argument taxes sagacity to the utmost, but an entire want of it is shown whenever the advocate endeavors to impugn such an argument itself.

§ 330. The Refutation: Refutable Arguments.

Of refutable arguments some may be too weak to merit refutation. In that event, the attention paid to them by the formal attempt to overthrow them gives them an undue weight in the minds of the hearers, and hence, if answered, it should only be with ridicule or flat denial. Arguments which possess an appreciable strength, and yet are not impregnable, are proper subjects for direct refutation. This refutation will consist in an attack either upon the basic fact, or upon the deduction. The basic fact may be denied, or rendered doubtful, or qualified in character or degree. The inference may be shown to be defective, either as resting on a false assumption, or as not excluding other contradicting inferences. When the fact can be denied or qualified, the refutation is much more effective, because more easily comprehended, than when the accuracy of the deduction assailed.

§ 331. The Refutation: Mode of.

In stating adverse arguments in order to refute them, the advocate should employ language calculated to tone them down, and make them appear weak while clearly expressing them. This, of itself, is a sort of refutation, and predisposes the hearer to be influenced by the attack which follows. In this attack, the adverse arguments should be dispersed and

answered in detail ; for, as it is the interest of his opponent to mass his weaker proofs lest their weakness be apparent, so is it the duty of the advocate to scatter and destroy them one by one. By this method, arguments which at first blush seemed important and convincing are often rendered empty and ridiculous. The order pursued in refutation may be that adopted by the adversary in his proof, or that which the natural sequence of thought would indicate. Ordinarily the strongest arguments should first be met and overcome, and then the weaker separated and demolished ; but when it is expedient to remove some hostile bias from the jury before endeavoring to refute the principal opposing arguments, the weaker may be first impugned with the promise that the others shall in due time be considered. Every adverse argument that is noticed at all should be met with energy and a show of confidence. The manner of an advocate should never indicate that he regards his adversary's arguments as formidable, but in the secret of his own thoughts he should never underestimate their strength.

§ 332. The Proof and Refutation: their Order.

In the natural order of discussion the proof precedes the refutation, and the disputant thus vindicates his own claims before denying those of his antagonist. But a departure from this order often becomes necessary. When the opposing arguments have been adduced, and have made a strong impression on the jury, the prospect of producing contrary convictions is very slight unless the present ones are first removed. Refutation then must precede proof, or at least must be so mingled with it as to prepare the way for the proof as it is offered. Although the adverse arguments have not yet been presented, they ought not on that account to be ignored. So far as possible, the advocate must anticipate and answer them in connection with his proof, or, when he is to have a later opportunity to address the jury, he

should now suggest them and promise to explode them if they are produced.

§ 333. The Proof and Refutation : their Style.

The style of the proof and refutation should be simple. Concise but not to a degree impairing its intelligibility, lively and interesting yet with little ornament, it should aim rather at communicating ideas than at awakening emotions. Still, when the subject renders it appropriate, a higher and more decorated style may be employed, rhetorical figures may be freely used, and the manner of the advocate display the intensity of his convictions and the urgency of his demands. Clearness, however, is the essential requisite. To secure this, each separate demonstration should commence with a restatement of the debated proposition in the words of the partition, and as the different arguments are finished their application to the proposition should be made, thus keeping the exact point in question, and its relation to the proof and refutation, constantly exposed to view.

§ 334. The Proof and Refutation on Issues at Law.

In demonstrating a legal proposition the advocate is governed by the same general rules. Arguments are discovered and constructed by comparing the debated proposition with recognized legal principles, and investigating whether and in what manner it can be deduced from them. The soundness and convincing power of arguments are measured by the tests of fidelity to dialectic form, and of adaptability to the knowledge, temperament, and predisposition of the judge to whom they are addressed. Their strength is greatest when the basic principle is familiar as well as undisputed, and the deduction necessary ; least, when the principle is strange or doubtful, and the inference merely possible. The restriction of the number of the arguments ; the selection, so far as the case will permit, of those only which consist of necessary or highly

probable inferences from statutes, maxims, definitions, precedents, and rules of practice ; the resort to decisions in other jurisdictions, to analogous cases, to considerations of public policy and of the spirit of the law, or to possible inferences, only when the question is so infrequent or obscure that no other guide to its solution can be found ; the grouping of the arguments in such a series as to display the strong, consolidate the weak, and constantly increase in vigor as the proof proceeds ; and the method and arrangement of the refutation ; — all follow rules identical in purpose and in operation with those which govern arguments of fact.

CHAPTER IV.

OF THE PERORATION.

§ 335. The Peroration: its Purposes, Character, and Forms.

The fourth and concluding part of an oration is the Peroration. Its purpose is to produce upon the hearer a final impression, in the highest degree favorable to the claims of the orator. With this aim it addresses both his intellect and his emotions, presenting the leading ideas of the oration in the most vivid and energetic language, and appealing to every impulse which these ideas are calculated to arouse. In matter, style, and manner of delivery, it must therefore be suited to the other parts of the oration, and follow from them as their natural result and culmination. Like all the rest of the oration, it must also be appropriate to the cause and the occasion, making no demand either upon the judgment or the feelings of the hearers which these do not evidently justify. It may assume one or the other of two forms: (1) A summing up and concise reassertion of the preceding parts of the discourse; (2) A direct appeal to the emotions. These forms are not, however, exclusive of each other, but, whichever be employed, the other may be blended with it in such a measure as the subject or the circumstances may require.

§ 336. The Peroration: First Form: Summation.

After a long discourse involving many and varied demonstrations, and in complicated causes where any one of the subordinate points may become important and decisive of the issue, a final summing up is necessary, both to refresh

the memory of the hearers, and to present the subject-matter to their judgment in the most compact and comprehensive form. Such a summation should not, however, be a repetition of the preceding demonstrations, in the same terms and order, but should embrace only essential propositions with their most conclusive arguments, rapidly outlining as to each its proof and refutation, and emphasizing in the strongest suitable language their respective weight and value. Brevity and precision are the chief characteristics of the style of a summation ; but while preserving these, its expression and delivery should be forcible and animated, and simple figures of thought or speech may be employed to illustrate the arguments, or to intensify their operation.

§ 337. The Peroration: Second Form: Appeal to the Emotions: when Attempted.

Where the nature of the cause, or of any of its principal incidents, would naturally awaken sympathy or excite emotions, a direct appeal to the feelings of the hearers is appropriate and effective. Of the existence of the grounds for such appeal, and of its probable success, the advocate can best judge by the effect which they produce upon himself. If his contemplation of the cause, in its entirety or its detail, arouses his own feelings, his hearers are likely to experience the same emotions when the same ideas are as vividly presented to their minds ; and contrariwise, if no such effect follows in himself, no words that he can utter will stir in their hearts the impulses which lie dormant in his own. If, therefore, there is nothing in the cause which naturally inflames the advocate, there is also nothing with which he can reasonably expect to inflame the hearer. But even when the cause contains elements which would excite emotions if properly represented to the hearers, the advocate may not be able, either from dulness of imagination, or his limited command of language, or his habitual coldness

or constraint of manner, to so portray them to his hearers as to awake in them the feelings which have been produced in him. Under these conditions, no direct appeal should ever be attempted. Its failure is almost certain, and invariably excites suspicion and disgust. An advocate of such limitations may safely try to touch the heart by casual suggestions woven into the severer portions of his speech, but risks his reputation and his cause alike by flights of eloquence which he cannot sustain.

§ 338. The Peroration: Second Form: Appeal to the Emotions: Method.

In appealing to the emotions, any idea connected with the cause or having an apparent relation to it may be made available, and the appeal may be directed to every favorable emotion which the ideas are able to arouse. But while the number and variety of feelings summoned into active operation may be great, no single feeling can respond to a protracted stimulation. Emotion is of its own nature transient. It kindles, blazes, consumes itself, and dies ; and in its ashes lie concealed no smouldering embers which can again, by the same breath of thought or language, be awakened into flame. The orator should never prolong his appeal until the feeling it excites commences to decline, much less after it has entirely passed away ; for the ideas which first attracted now repel, and the impulse which, but a moment since, seemed irresistible, has given place to an exhaustion and inertia from which the same ideas, if further urged, are far more likely to develop a new and antagonistic impulse than to revive the old. To stimulate the feeling to its height and then instantly to change the subject, either addressing different emotions or descending to the lower levels of discussion or narration, and leave the feeling to dissipate unnoticed by the hearer, is to secure all the advantages of its effect upon the will, and hazard no reaction with its possi-

bilities of loss. The style of the appeal should fitly clothe the thoughts and feelings which the orator expresses and inspires; moderate, when the emotions are temperately stirred; sublime, where the whole nature of the speaker and his hearers is aroused. All ornaments of rhetoric, all arts of elocution, are appropriate, provided only that the tide of feeling rises to their mark, and that the words and actions seem to follow, and not lead, the progress of the intellect and heart.

§ 339. The Peroration: Second Form: Appeal to the Emotions: Variations in Form.

The effect of an oration is sometimes increased by distributing the direct appeal to the emotions through the demonstration, and arousing the impulses suited to each proposition in connection with its proof and refutation. This is particularly expedient when the cause is one of absorbing interest, and pregnant with emotional energy whose entire display in the peroration would overload that part of the discourse, and strain beyond endurance the feelings and attention of the hearers. These intermediate appeals should always be extremely brief, be embraced in a few sentences, and never offered until the propositions on which they are based are fully proved. Aside from these and the peroration, no direct appeal to the emotions can properly be made. But the entire oration, with all its methods and surroundings, is an indirect appeal, and incidentally the orator may touch the heart whenever the hearers are prepared to feel the impulse, and the means of waking it are at his command.

§ 340. The Peroration: its Conclusion.

The peroration, being the conclusion of the whole discourse, should always end with dignity and strength. An abrupt termination which takes the hearer by surprise, a gradual debilitation of ideas and words which indicates that the resources of the speaker are exhausted, a promise to

conclude, without concluding, which tries the patience of the hearers more severely than the most protracted speech, are serious faults,— faults serious enough to mar, if not destroy, the good impressions made by an oration otherwise persuasive and convincing. As the conclusion is approached, the thoughts and language, the tone and manner, of the orator should apprise his hearers that the end has come; then with a strong, harmonious period, embodying the essence of the entire oration, forcible in its utterance, grave in its delivery, he should close.

CHAPTER V.

OF THE PREPARATION OF AN ORATION.

§ 341. Preparation of an Oration: its Order.

In preparing an oration, the first part which demands attention is the partition. Having thoroughly investigated his subject-matter, and collected all the ideas embraced in or related to it, the orator enumerates the various propositions which are to be discussed, framing each with great care and precision, and arranging them in their natural order as they are to be presented to his hearers. In forensic oratory these propositions are the issues in the cause, whose character is indicated by the pleadings, but whose accurate and comprehensive definition often requires a high degree of legal knowledge and of verbal skill. Upon each of these propositions, the arguments which constitute its proof and refutation will then be prepared, every argument being selected with regard both to its soundness and convincing power, the adverse arguments anticipated and their answers planned, and all distributed in such a series as to exhibit in the clearest light the strength of one side and the weakness of the other. On this part of the oration any amount of labor may be profitably expended, the arguments and refutations being cast in different forms, their language corrected and intensified, their sequence varied, and every effort made to secure that mode of demonstration which shall be at once the shortest and the most conclusive. Next follows the construction of the statement, rehearsing all the facts which enter into the essence of the controversy, or form the bases of the arguments, in chronological order, and with adequate details. The substantial parts of the discourse having been

thus prepared, the nature of the peroration is to be determined in view of the preceding proof and refutation, and of the general tone of the oration, and the summation or appeal composed. Last he chooses the exordium, which, being designed to introduce the other parts, must contain matter connected with but not anticipating them, and hence must be selected after these are finished. These four divisions are now placed in proper order, each is united to its successor by an appropriate transition sentence, and the oration is completed.

§ 342. The Preparation of an Oration: Writing.

The perfect preparation of a discourse requires not only that its ideas should be selected and arranged, but that its words should be written out and memorized; and though this is sometimes impossible, the facility with which an orator constructs extemporaneous speeches, during their delivery, depends too much upon his habit of writing and learning his orations to permit him to neglect it when he has the opportunity. An orator should write slowly and accurately, carefully choosing his language and rhetorical figures, framing his sentences with unity and strength, and testing their rhythm by repeating them aloud until their flow of sound is smooth and pleasing. That which is thus written must be again and again revised, words changed for their synonyms or for more natural expressions, and their arrangement altered whenever greater intelligibility or force can be thereby secured. For the purpose of making such corrections, it is advisable to leave wide margins and interlinear spaces, and an occasional blank page for substitutions or additions.

§ 343. The Preparation of an Oration: Memorizing.

The ability to commit to memory their own orations some orators possess in a remarkable degree; a single reading of what they have already written enabling them to repeat it with perfect verbal accuracy, even after considerable periods

of time. But such memories are rare, and the ordinary speaker is usually compelled to avail himself of all the aids to memory which he can devise. Pre-eminent among these are the judicious division and natural arrangement of the subject itself, for these once made will seldom be departed from, and will themselves suggest the language which has been employed for their expression. The separation of each division from the others in the act of learning them, that one may not depend on the closing words of the preceding, the selection of striking catch-words for the commencement of the divisions, and the study of the parts aloud and not merely with the eye or the interior voice, are also useful. But however successful he may be in such efforts, an orator ought not to trust his memory alone, for on any occasion it is possible that some transient bodily disturbance, or an unusual occurrence in the audience, may interrupt the current of his thoughts and temporarily suspend the recollection of his words. To provide against such emergencies, he should have before him a skeleton of his oration, with the initial words of each division, that in the event of his forgetfulness in one he may immediately go forward with another.

§ 344. The Preparation of an Oration: Extemporaneous Orations: Mode of Acquiring Facility in: Adopting a Fixed Plan of Speech.

Extemporaneous orations are of two classes: (1) Those in which the ideas and words are both extemporaneous; (2) Those in which the ideas are premeditated and the words only are extemporaneous. Any orator may be compelled to resort at some time to these methods of discourse, and a facility in speaking without premeditated thoughts and words is, therefore, most desirable. The first step to be taken for acquiring this facility is to adopt some fixed plan of discourse, and train the mind to follow it. This plan must, of course,

contain the four parts of an oration, in their proper order. Both the exordium and the peroration should consist of matter of a general character applicable to a variety of cases and occasions, and should be written out and memorized ; leaving only the statement, and the proof and refutation, to be provided from the subject concerning which the oration may happen to be made ; and even the form of these, with their connecting sentences, may also be composed. Thus furnished with a beginning and an ending, and with an intermediate framework on which to display the ideas peculiar to the question that may be discussed, the orator who understands his subject is never unprepared to speak. Having formed his plan, the orator should then accustom himself to its use by speaking upon different subjects suddenly, and without any forethought, until his mind runs in that channel without conscious effort. The ease and fluency which can be acquired by such long continued discipline almost staggers belief ; and by its means persons comparatively illiterate often become able to discourse agreeably and forcibly upon a subject suggested by the audience, to the astonishment of all who hear them. The mechanical character of such an oration constitutes no objection to it, for it will never be suspected unless too frequently repeated. Nor is it in any way unworthy of the orator. Among the compositions of Demosthenes are said to have been found more than fifty of these exordia, evidently prepared for this purpose, and Cicero describes his own volume of proems from which he could select at once whatever might be suited to his needs.

**§ 345. The Preparation of an Oration : Extemporaneous
Orations : Mode of Acquiring Facility in : Habits
of Observing and Remembering Details.**

The habit of presenting to his mind the images of things, or recalling what he has seen and heard to his imagination,

is of immense advantage to an orator, especially in his extemporaneous discourse. Men whose thoughts are for the most part occupied with abstract conceptions, and to whom an object is a mere group of attributes with no particular features to distinguish it from other objects of its kind, may be accurate reasoners and critical philologists, but are rarely effective orators, and seldom succeed in unpremeditated speech. On the other hand, men whose eyes are open to all the diversities of form, color, and action in external things, and whose memories retain these details with exactness, possess powers of description and narration which interest and please either in conversation or in oratory. The charm of a discourse mainly consists in the vividness with which the audience are made to see what the orator is endeavoring to portray, and this depends upon the clearness with which he beholds it in his own mind, and the particularity with which he can depict it by his words. Hence it is that some men can tell a story, or describe a scene or an event, with wonderful effect, while others in the same attempt will fail entirely. One perceives it perfectly and in all its circumstances as he narrates it; the other views it only in its dim and fragmentary outlines, and can impart no fuller vision than he himself enjoys. Undoubtedly this ability is natural, for "some men are born with eyes and some without them." But in every person it can be cultivated to a considerable degree. By properly forming in the mind the images of things heard or seen, by studying the details of objects observed or events witnessed, and by endeavoring in ordinary conversation to recall and picture these accidental but most interesting features, the habit both of seeing and retaining them may be developed, and lend to a discourse which otherwise would be mere empty sound a wonderful attractiveness and power.

§ 346. The Preparation of an Oration: Extemporaneous Orations: Mode of Acquiring Facility in: Habit of Speaking Slowly.

The habit of speaking slowly is also conducive to the success of an extemporaneous oration. For various reasons this habit is essential to an orator, but as a method of acquiring and preserving such self-command as enables him to select his thoughts and words as he progresses it is of very great utility. A rapid speaker often runs ahead of his ideas, and utters that which commits him to further statements beyond or inconsistent with his subject, and thus diverts himself from the real point of his oration. But one who speaks with moderation has an opportunity to judge each word before it issues from his lips, and thus at once protects himself from error and presents a strong, harmonious discourse.

§ 347. The Preparation of an Oration: Extemporaneous Orations: Mode of Acquiring Facility in: Habit of Collating Ideas as Produced in Evidence.

Another habit is of great assistance to the advocate in his extemporaneous orations, — that of arranging his facts under their proper heads as they are testified to by the witnesses. This occupies little time and involves no considerable labor, but places the ideas for his oration in complete readiness for use as soon as the evidence is closed. To prepare a paper with the points in controversy arranged upon it in their order of discussion, and under each to insert the principal matters bearing on the case, with a brief memorandum of the arguments which they suggest, provides him, if his exordium and peroration have been previously composed, with a complete skeleton of his oration, and with nothing new to furnish at the moment of delivery except the language in which his demonstration is expressed.

§ 348. The Preparation of an Oration: Extemporaneous Orations: Mode of Acquiring Facility in: Premeditation of the Ideas.

When the ideas of an oration are premeditated and the words alone are to be extemporized, the difficulties of the orator are comparatively few. If he is a man of good reading, and has cultivated habits of accurate and graceful speaking in his ordinary conversation, he will encounter no obstacles except those which arise out of his own self-consciousness. This is a form of pride or vanity, and consists in the fear that he will fail, or that his efforts will not be appreciated. The power to utter thought is natural to all men. Children, not yet educated into self-consciousness, never find any hindrances in their endeavors to express themselves. Their language is nearly always forcible and graceful, as also is the action by which they illustrate their speech. This fault of education it is not easy to correct. But an orator who lives in familiar intercourse with his fellow men, participating in their enterprises and amusements, taking and giving the customary sarcasms and rebuffs of life, is far less likely to suffer from it than the silent, quiet student, who dwells in and by himself, and to whom men in general are aliens, if they are not foes. The only mode of conquering it, on the instant, is to become so absorbed in the delivery of the oration as to forget self for the time, in the desire to bend the hearers to his will.

§ 349. The Preparation of an Oration: Extemporaneous Orations: Mode of Acquiring Facility in: Ideas Premeditated: Skeleton.

In speaking from premeditated ideas a written skeleton, containing the outlines of the speech, should always be prepared. Apart from the risk of neglecting some important thought while in the heat of the delivery, there is great danger that the temptations to digression, which constantly befall the

advocate, will lead him so far away from the main thread of his discourse that he can never properly return. This danger is avoided by previously spreading the heads of the oration upon paper, and following its guidance during the act of speaking. This skeleton should be sufficiently complete to recall to his memory, at an instant's glance, every idea he wishes to express, and every figure of speech he intends to employ. It should be written in so clear and bold a hand that it will not perplex the eye, and with such spaces between its different members as will enable him to insert any new idea which the evidence or his adversary may suggest.

BOOK IV.

OF DELIVERY.

§ 350. Delivery: its Importance, Purposes, and Divisions.

The last and crowning act of oratory is delivery. It is to this act that the power of eloquence is commonly attributed, not merely by unlettered audiences, but by the wisest and most skilful orators; for true and noble thoughts though clothed in excellent expressions, if ill delivered, exercise little influence upon a hearer compared with ordinary ideas and language uttered with all the energy and grace of cultivated speech and action. "It is of less moment," says Quintilian, "what our thoughts are, than in what manner we express them, since those whom we address are moved only as they hear. . . . For my own part I can say, that language of but moderate merit, if recommended by a forcible delivery, will make more impression than the very best, if unattended with that advantage." Like other acts of oratory, delivery has two purposes: to convince and to persuade. It involves two concurrent processes: the use of voice and gesture.

CHAPTER I.

OF VOICE.

§ 351. Delivery: the Voice: its Qualities and Cultivation.

A voice suitable for oratorical use possesses a clear, sweet tone, a volume sufficient to fill the auditorium in which the oration is to be pronounced, and perfect flexibility. A good voice is no less necessary to the orator than to the songstress or the actor, and in his case, as well as theirs, is largely the result of cultivation. Every human voice contains agreeable tones which are numerous enough to serve the purposes of oratory. All of these that are within the natural range of his own voice the orator can readily discover, and should then employ them exclusively in singing and in reading aloud until they become habitual, avoiding at the same time those faults of utterance which, in so many singers, render even their sweet notes unintelligible. The volume of the voice depends partly on the condition of the lungs and throat, and partly on the management of the vocal organs. To the comfort of an orator strong and healthy lungs are essential, and much can be done by proper exercise for their invigoration. The throat and vocal cords can be preserved from injury by guarding against cold and dietetic errors, and are improved in vigor and endurance by reasonable and constant use. In speaking, the formation of the articulated sounds may take place anywhere between the summit of the larynx and the lips. The nearer to the lips this sound is formed, the farther into space will it penetrate with the same exertion of the lungs and throat, and thus the volume of the voice may be increased without additional force of respiration. Practice in this formation of the sounds is one of the most

valuable remedies for all defects of voice and articulation, and qualifies an orator to address large audiences, for a long time, without undue fatigue. Flexibility is best cultivated by singing and declaiming compositions in which the voice is kept in constant change from slow to rapid movement and from the highest to the lowest tones.

§ 352. Delivery: the Voice: its Management.

Of every human voice there are three keys, or degrees of audibility: the high, the middle, and the low. The differences in these degrees depend not only on the tone and volume of the voice, but on the size and structure of the auditorium. In ordinary discourse the middle key is used, the high and low in parts more forcible or solemn. On any given occasion, therefore, the middle key, which fills the room and is distinctly heard by every listener, determines the gradations of the voice for the entire oration, and must be found at its commencement if the orator would speak with comfort and be certain that his audience can hear. This is accomplished by addressing the remotest auditors in a natural key, and gradually elevating its tone, and increasing its volume, until he finds that his own enunciation becomes easy, while yet the whole space around him is full of the vibrations of his voice. Experience alone can give an orator the complete command of this faculty, but it can be acquired to an extent which will enable him to speak without difficulty anywhere indoors, when distance is the only obstacle to be encountered. If the auditorium is acoustically defective, as where it is inhabited by an echo or reverberation, no effort of the orator can overcome it. The necessary middle key having been thus discovered, the orator must restrain his voice within its limits, except when the idea which he expresses requires a higher or a lower key, never even then dropping his voice so far as to become inaudible, nor raising it until it shocks and offends the ear.

§ 353. Delivery: the Voice: Articulation: its Qualities and Defects.

An orator must articulate each sound of every word distinctly and deliberately, uttering the syllables with promptness and the entire word without interruption, and pausing at the proper intervals to regain his breath. One of the most common faults, which mars the speech of otherwise good orators, is the emission of an inarticulate sound before commencing the pronunciation of a word. This is occasioned by a premature nervous impulse, unconsciously imparted to the vocal organs before the idea and the word by which it is to be expressed are fully apparent to the mind and ready for delivery. It is a fault at once ludicrous and serious, is rarely noticed by its victim, and therefore is not often curable except by the immediate admonitions of some persistent friend. Other faults consist in speaking through the nose; forming the voice in the throat, instead of with the lips; mumbling the sounds in the mouth; drawling, weakening, or omitting some of the sounds in a word, especially that of the final syllable; pausing in the middle of a word; letting the voice fall at the conclusion of a sentence; and excessive slowness or rapidity. Each of these faults indicates either a defective training or a careless habit in the speaker, and is removable by discipline.

§ 354. Delivery: the Voice: Pronunciation: Accent: Emphasis: Pauses: Inflections.

An orator should pronounce his words with propriety and elegance, according to the prevailing standards, and with the boldness and energy of one who speaks from his own convictions, and is intent on their acceptance by his hearers. He must give the correct accent to all polysyllabic words, and emphasize the important words of every sentence in such a manner as to bring out its precise meaning, and exhibit the relations of its members to each other.

He must observe those pauses, which precede or follow passages of unusual significance in order to direct attention to them, or to allow the mind to rest upon them for an instant, and thus strengthen their impression. The inflections of his voice must vary with the changing current of his thoughts, obeying, here as elsewhere, the dictates of nature, which spontaneously finds for every idea and emotion its appropriate utterance, until self-consciousness or artificial mannerism destroys the unpremeditated correspondence between the interior thought and the mode of its exterior expression. He must speak rapidly or slowly, with vivacity or seriousness, in loud or soft tones, as the sentiment requires, alike avoiding haste, undue excitement, excessive eagerness, inaudible soliloquy, and boisterous vociferation.

§ 355. Delivery: the Voice: Adaptation to Different Parts of the Oration.

Each part of an oration has its appropriate mode of utterance. In the exordium the tones of the voice should be gentle, sweet, and winning, its volume moderate and its pronunciation slow, unless the feelings of the audience, aroused by some preceding incident, demand a vigorous outburst from the orator. In the statement, the voice, though calm and even, attains a higher key, and indulges in a stronger emphasis and a more varied inflection. In the proof and refutation, as also in a peroration which sums up the arguments, the general tone is slow and forcible; in hot dispute becoming quick and pungent; in description, sprightly or solemn as the incident demands; in digression, cheerful and flowing; in ridicule and sarcasm, light and tremulous. In the appeal to the emotions, whether occurring at the end of the oration, or terminating the several demonstrations, or distributed throughout the body of the speech, the voice adapts itself to the particular emotion which the orator appears to feel and thus endeavors to arouse; if pity, tender and

mournful ; if indignation, rapid, sharp, and strong ; if pleasure, full and clear ; if sober condemnation, serious and slow. The vehemence of passion manifests itself in a high and rising voice ; and the repose of feeling in lower tones and falling cadences.

§ 356. Delivery: the Voice: Acquisition of Facility in its Management and Use.

Under ancient systems of education the training of children in the proper use of their own language, both for writing and speaking, was protracted and severe, almost to the exclusion of other branches of learning now considered of paramount necessity. Those systems were of signal advantage to the orators of the periods in which they prevailed ; for never in maturer years can the human voice be cultivated with such ease and certainty of permanent results, or the memory be so fruitfully impregnated with rules and habits of correct pronunciation, accent, emphasis, and inflection, as in the vigilant and receptive age of childhood. Hence the importance of that ceaseless drill in spelling, reading, and declamation, so often in our modern schools neglected in order to make way for studies whose thin veneer soon cracks and falls off from the pupil's mind, leaving its rough, unpolished texture manifest through life in its illogical processes of thought, in the superficiality of all its knowledge, and in the grotesque deformities of its expressions. To the old systems and their methods the training of our children perhaps never will return, but for the orator, whose early years were not spent in the mastery of his mother tongue, no other course is open but to begin with spelling-book and reader, and to pursue, with such instruction as he can procure, the arduous task of vocal culture, until his utterance is as forcible and pleasing as under proper discipline it should have been before he passed from boyhood into man.

CHAPTER II.

OF GESTURE.

§ 357. Delivery: Gesture: its Nature and Divisions.

Gesture consists in the adaptation of the motions of the countenance, and of the other portions of the body, to the ideas and language of the speaker. Its influence upon the minds and feelings of an audience is often more powerful than that of the words, since it addresses the eye, the medium of the most direct and forcible impressions, and represents the thoughts and emotions of the orator, not by mere symbols, but in actual operation. Nor are its methods less diversified than those of speech, for Cicero tells us that his friend Roscius, the actor, could express by gesture every idea that he himself could clothe in words. Its various forms, for purposes of explanation, may be grouped and considered under these three heads: (1) The general position of the body; (2) The expression of the countenance; (3) The use of the head, arms, and hands in gesticulation.

§ 358. Delivery: Gesture: General Position of the Body.

Four attitudes, or general positions of the body as a whole, are known to oratory. In the first position, the right foot is advanced and the weight of the body is supported by it, the left foot touching the ground lightly, with its heel a few inches behind the right. In the second position, the locations of the feet are reversed, the left foot being thrust forward to support the body, while the right recedes. These are the attitudes of aggression, suitable to salutation, to interrogatory and invective, to aversion toward things absent, to appeal except when made to powers invisible, to anxiety or

despair concerning the present, to the description of objects near at hand, or below the line of the horizon, or behind the speaker, or already past, and to all efforts to attract attention or to impress the views of the speaker on the hearer. The third position differs from the first, and the fourth from the second, only in that the weight of the body is in each supported by the rearward foot. These are attitudes of repose, to be assumed whenever the orator is engaged in mere narration, in describing objects before him in the distance or above the horizon line, in appeals to the invisible powers, in expressing amazement or remorse, and in manifestations of fear, repulsion, or horror toward things present. These are the only general positions of the body proper for an orator. There is no occasion when he should stand heel to heel, or with straddled limbs each equally advanced.

§ 359. Delivery: Gesture: Changing the Positions of the Body.

A change from one of these positions to another becomes necessary with every change of subject, or when a different portion of the audience is to be addressed. A frequent shifting of positions is, however, unadvisable, giving to the orator an appearance of anxiety and restlessness; and this should be remembered when preparing the oration, in order that the subjects may be so arranged as to avoid it. To change with ease and grace from one attitude of aggression to another, the backward foot should be moved forward and receive the weight of the body, which turns at the same time to front the new direction, while the other foot falls gently in the rear. To change from one attitude of repose to another, the forward foot is carried outward to the right or left, the weight of the body is then thrown upon it, and the other foot is advanced sidewise to its place. To change from a position of aggression to one of repose, the backward foot slides farther backward, receiving the weight of the body, and the

forward foot is drawn back to its former distance from the other. To change from a position of repose to one of aggression, the forward foot moves forward, the weight of the body is transferred to it, and the backward foot follows to its proper interval behind the other.

§ 360. Delivery: Gesture: General Positions of the Body: Carriage of Head and Limbs: Faults of Carriage.

Except in some peculiar gestures the head and body are to be erect, and inclined backward or forward to suit the different positions just described. The arms, unless in use in making gestures, should hang easily by the side of the body, and the legs be kept straight and firm. The attitude of the orator should be one of entire self-command. An aimless swinging of the arms, twiddling the hands at the sides or putting them in the pockets or the breast, standing upon one leg and bending the other or allowing it to hang down uselessly, swaying from side to side, wandering back and forth while talking, eating or drinking or conversing in the pauses of the speech, or any other posture or action inconsistent with the responsible task in which he is engaged or with the evident absorption of all his energies in its performance, exhibits him as weak in purpose, uncultured in the rules of oratorical propriety, or indifferent to the welfare of his cause. In an earnest, determined speaker, conscious of the merits of his claims and devoted for the time being to their vindication, no such symptoms of self-abandonment are ever visible. The strength of his own convictions, and the intensity of his desire to prevail upon his hearers to adopt them, manifest themselves in every position of his body and every motion of his limbs. But dignity of carriage must not approach the opposite extreme, and degenerate into stiffness and frigidity. These are faults less grave indeed than the preceding, yet into neither will the orator be led, if he appreciates the purposes of oratory, and discipline has taught him self-control.

§ 361. Delivery: Gesture: Expression of the Countenance.

The human features, and especially the mouth and eyes, are exponents of thought and feeling often more powerful than the utterances of the tongue. Every sentiment of the heart, almost every conception of the mind, imprints its own peculiar mark upon the countenance. Love and hatred, joy and sorrow, fear and hope, confidence and modesty, find here their full expression, and in this silent language we threaten or implore, invite or repel, refuse or acquiesce, despise or pity or condemn. Upon the action of the features in oratory, and upon the methods by which the orator may teach his eye to flash, his lip to quiver, and his whole frame to throb with the emotions which he in vain endeavors to suppress, a volume might be written. But the principle to which all such methods are reducible is this: to follow nature. The face of early childhood unerringly reveals the tempests which disturb, the sunshine which irradiates, the soul. The harsh antagonisms of later years compel the youth to restrain these manifestations of his feelings in order to escape ridicule or blame, and this restraint by slow degrees creates for him an artificial face which hides or falsely represents the man within. The training of the orator in this respect, like that of the actor, consists in a return to nature. He must break the spell which holds his features in their frozen slumber. He must withdraw the unconscious tyranny which his will maintains over the muscles of his face, and restore to his emotions their ancient and legitimate control. This return to nature is promoted: first, by the habit of presenting to his imagination the minute details of conditions and occurrences, identifying himself with the objects or the persons to whom they relate, and thereby learning to feel the sentiments, which he expresses, with such intensity as the sensitiveness of his disposition will permit; second, by practising in entire privacy the declamation of original or selected com-

positions whose thoughts affect him deeply, giving free rein to the emotions thus aroused, not studying to mobilize his countenance, but concentrating his attention on the subject and leaving his features to respond to its ideas as they will. To watch the play of feeling on the faces of accomplished orators and actors is also useful, not to become their servile imitator, for nature never copies, but to assure himself of the immeasurable energy of these forms of expression, and to encourage him to cast off all restraint, and abandon his own features to the dominant impulses of his heart. To the extent of such a training, however, nature places this limitation, that no expression on the countenance shall differ from or shall exceed the character or degree of the emotion which it is supposed to represent, or be inconsistent with the evident disposition of the speaker. Every excess in facial gesture is a mere grimace, ridiculous in itself, intolerable to the earnest and intelligent hearer, and indicates that the orator is lacking either in good sense or in sincerity. In its development of a tendency to this excess lies the danger of every mode of artificial training which is directed to the motions of the countenance, rather than to the imagination and feelings of the speaker and to the deliverance of his features from his habitual and intentional control.

§ 362. Delivery: Gesture: Motions of the Head and Body.

Gesticulation, or the expression of particular sentiments by means of particular and appropriate actions, is performed either by the head, the hands and arms, or the whole body. Motions of the head or body are rarely employed except in connection with gestures by the hands and arms, and whenever they are not appropriate they constitute faults of a serious character. But in connection with the arms and hands, the head is in constant and the body in frequent action. The head turns upward or downward or to the side, so that the eye may follow every movement of the hand, ex-

cept in gestures of repulsion or aversion, where it gazes in a contrary direction. Sometimes the motion of the head corresponds with that of the hand, as where the finger and the head together nod in interrogatory, or the head shakes as the hand falls in a negation. The body moves as if yielding to the momentum caused by the gesture of the hand, especially in a double gesture, bowing forward as the hands come down in solemn emphasis, or starting backward as they are raised in adjuration or amazement. In strong aversion, where both hands are used, not only the head but the whole body is turned away from the detested object.

§ 363. Delivery: Gesture: Motions of the Arms and Hands: Single Gestures.

Gestures of the hands and arms are, however, the principal methods of expressing and emphasizing thought. These are divided into two great classes: single gestures and double gestures. Single gestures are those which are performed with one hand and arm. Quintilian and other ancient writers state that the right arm alone should be used for this purpose, and that the left should never be employed except in double gestures. Later authors permit the use of the left arm upon rare occasions, where contrasts are being made, or where objects referred to are on the left hand of the speaker. Single gestures are of three classes, palm-up, palm-down, and index-finger; and each of these is divided into lower, middle, and upper, according as the stroke of the gesture terminates below, on the line of, or above the level of the shoulder. Each of these has its own peculiar significance.

§ 364. Delivery: Gesture: Motions of the Arms and Hands: Single Right Hand Gestures.

The lower palm-up gesture is an emphatic gesture, and is also used to denote objects near the speaker and not far

from the ground. The middle or level palm-up gesture is still more emphatic, and is employed in strong interrogation, in earnest exhortation, and in describing persons and things at some distance. The upper palm-up gesture is of the highest emphasis, belongs to spirited appeals for action, and to the description of objects above the line of the horizon. The lower palm-down gesture is expressive of scorn, rebuke, and condemnation. The middle palm-down gesture is appropriate to contempt mingled with command, and, with the hand moving horizontally, is also used in describing an expanse of land or water, or any spectacle supposed to be passing before the eye. The upper palm-down gesture is one of severe denunciation, threat, or extermination. This gesture has a double stroke, one terminating high in the air where the hand pauses for an instant, the other falling to about the level of the waist as the words of wrath are spoken.

§ 365. Delivery: Gesture: Motions of the Arms and Hands: Single Left Hand Gestures: Index-Finger Gestures.

There are also three other gestures, all made with the left hand, and called "palm-up off," the palm being up and the speaker standing in the first position. The lower one of these denotes things aside, passed by, neglected. The middle signifies distant events in the past, distant objects and persons, or objects far behind the speaker, and also scorn of a dignified and compassionate character. The upper is reverential, devotional, used in alluding to the invisible world above, the stars, or eternity. The lower index-finger gesture is used to indicate objects, or to note points, or to express contempt. The middle index-finger gesture is appropriate to interrogatory and adjuration of a person present, also, when in rapid motion horizontally, it expresses swiftness and strength combined. The upper index-finger gesture calls attention to particular objects at a

high elevation, or, in its course as the hand rises, is expressive of the soaring either of thoughts or material objects.

§ 366. Delivery: Gesture: Motions of the Arms and Hands: Course of Single Gesture: Position of the Fingers and Body.

In all these gestures the hand passes through a curve, called the course of the gesture, from its natural position by the body to the point where the gesture terminates, and, stopping there an instant, falls gently back to its former place of repose. Except in the double-stroke gesture, called the upper palm-down, this curve is always inward toward the median line of the body, and rises a little above the point where the gesture is to terminate. In all these gestures, also, the whole arm moves freely together, the elbow being but slightly flexed, and never held against the side while the forearm alone is in action. In the palm-up and palm-down gestures the fingers are nearly straight but not stiffened, and closed together with the thumb turned upward and just removed from the side of the forefinger. In the index-finger gestures, the forefinger is extended, the thumb stands moderately distant from it, and the other fingers are curved toward the hand but not shut together. In every case except the "off" gestures, the position of the body corresponds to the hand with which the gesture is made; the second or fourth position being assumed whenever the left hand is to be used, and at other times the first or third position being retained.

§ 367. Delivery: Gesture: Motions of the Arms and Hands: Double Gestures.

Double gestures are those in which both hands are employed at once. There are no "off" gestures among them, and but one index-finger gesture. They are lower, middle, and upper palm-up; lower, middle, and upper palm-down;

with several peculiar gestures not capable of being classified. They are produced, so far as each hand is concerned, in the same manner as the single gestures of the same class. The lower double palm-up gesture signifies space or local extent near the speaker; it is also used, instead of the single one, as a gesture of emphasis, and is of great value as a terminating gesture at the end of a sentence. The middle double palm-up gesture describes wider space, large assemblages of people, or the whole earth. The upper double palm-up gesture expresses grand and lofty objects, sublime and inspiring thoughts, and is the appropriate gesture of apostrophe and solemn adjuration. The lower double palm-down gesture carries the idea of rebuke, casting down, scorn, contempt, like the single gesture of the same class. The middle double palm-down gesture expresses speed and extent at once, as in descending or in violent repulsion, and with a horizontal motion of the arms at the end of the gesture conveys the idea of vastness and quietness combined. The upper double palm-down gesture has a double stroke, like the single; the upper stroke expressing admiration or surprise; the downward stroke denoting strong emphasis, or entire destruction. The double index-finger gesture is performed by placing the right index-finger on the palm of the left hand, and moving it thereon as if striking time. This gesture is used in noting, particularizing, discriminating between different objects, or in stating points of argument.

§ 368. Delivery: Gesture: Motions of the Arms and Hands: Imitative Double Gestures.

Besides these gestures there are others less used, and rather imitations of the conduct of persons while under the emotions described than true artificial modes of expressing thought. Thus to place the palms of the hands together before the heart, with the fingers pointing upward and the head raised, is a gesture of love and thankfulness. Crossing the hands

upon the breast, with the head raised, is appropriate to sentiments of adoration. The left hand lower palm-down, combined with the right hand upper palm-up, is a gesture of warm welcome, of salutation, or of command to distant persons, — the eye looking in the direction of the right hand. Both hands raised to the middle height, open, palms from the body, and head turned away from the hands, expresses disgust, abhorrence ; while the arms spread out at middle height, hands open towards the hearer, and the head facing in the same direction, denotes fright and alarm. The hands crossed with the palms outward on the breast, and then thrown suddenly to their full length at middle height, is the strongest of repelling gestures.

§ 369. Delivery: Gesture: Motions of the Arms and Hands: Imitative Single Gestures.

Of single gestures there are also special forms of a similar character. The right hand pressed upon the heart is appropriate to expressions of pity, compassion, appeal for sympathy, and other personal feelings of the speaker. Striking the heart with the point of the right thumb, the fingers being closed, is a gesture of foreboding, guilt, or remorse. The open right hand brought palm forward to the heart and struck out horizontally is a gesture of repulse, as also of speed and force. The right hand with the index-finger up and raised to a level with the ear, at half an arm's length from it, is a gesture of listening, — the ear at the same time being turned toward the expected sound, the body leaning in the same direction, and the eyes fixed on vacancy. The right hand index-finger raised gradually from the natural hanging posture to full height is a gesture describing the upward flight of birds, the passing of the soul, the elevation of the thoughts to heaven. The same gesture with the open hand, but with wider sweep and rapid motion, expresses sudden alarm, fearful emergency, the war of the elements,

or any other startling idea. Pressure of one or both hands on the forehead with a drawing motion indicates fixed mental agony or despair, while pressing the folded hands upon the breast denotes sudden impulses of distress and anguish of mind.

§ 370. Delivery: Gesture: Motions of the Arms and Hands: Alternate Gestures: Continuous Gestures.

There are, besides these, what are known as alternate gestures and continuous gestures. The alternate gesture is used for the purpose of distinguishing, contrasting, and comparing. It consists of two corresponding gestures, one of the right hand, the other of the left, the second commencing just as the first begins to fall into its natural position. Continuous gestures are made by the same hand if single, of course by the same hands if double, and consist of two or more gestures, the former sliding into the latter without any intermediate coming of the hand to repose. It is appropriate where ideas, more or less antithetical, closely succeed each other in some connected thought, and is a gesture of conjunctive comparison, as the alternate gesture is of disjunctive comparison.

§ 371. Delivery: Gesture: Motions of the Arms and Hands: Importance of Special Training.

The study of this subject of gesticulation is of the very highest importance to the orator. The child is naturally graceful. The man has become habitually awkward. The one gesticulates boldly, unconsciously, and freely; the other, self-consciously, angularly, and with constraint. The faults of the latter must be educated out of him, as they have been educated into him; and this can be done only by constant practice, under some competent instruction, either personal according to known rules or under the guidance of a trained

elocutionist. Still it is an art which can be mastered by almost any one, and those who do not excel in it must, therefore, attribute their failure to their own neglect.

§ 372. Delivery of the Different Parts of an Oration: Propriety the most Essential Quality of Delivery.

Each of the parts of an oration has its own style of delivery. At the commencement it should be characterized by calmness and moderation, a grave countenance, erect attitude, and few gestures. In the statement the manner grows more decided and didactic, the gestures are still few but pointed, and the passions gently but skilfully aroused. The proof and refutation are varied and forcible, gestures become more frequent, displays of feeling are now and then permitted, and description is more extensive and florid in its tone. In the peroration all the power of the orator is in activity, so far as is appropriate to the occasion, and every art is employed to give the hearers a favorable impression of his cause. Throughout the whole oration, however, one rule must be observed, that of propriety. There must be harmony between the cause, the thought, and its delivery. A great cause demands great thoughts and splendid action. An unimportant cause, with equal imperativeness, demands thoughts of a common order and a mild delivery. The orator should also keep within his own powers. Whatever weapons he possesses, and knows how to use, let him use them in his most effective manner. But he should never overreach himself, striving with subjects, thoughts, or modes of action that are too grand for him, mindful of the fate of those who undertook to wield the spear of Achilles, and of him who in his boyish presumption sought to guide the Chariot of the Sun.

CONCLUSION.

IN concluding this discussion of the theory and practice of the Art of Forensic Oratory, the author most earnestly desires to impress upon his readers the conviction that strict obedience to these rules opens to the young advocate the only possible pathway to success. Much that has been prescribed doubtless appears, as it really is, mechanical and artificial in the last degree. But this is true of every species of human training. The artist, who entrances generations by his wondrous forms and coloring, acquired his skill at the blackboard, the paint-mill, and the mixing slab. The musician, who thrills the hearts of his hearers with the notes which he produces, was once the slave of hard and ruthless teachers, who held him hours together pounding or scraping out his scales. The advocate can expect to obtain the mastery of his art through no other method. He must be content to learn from the experience of ages, to forego his own will, to put aside the juvenile notion that he is a natural genius and can succeed by inspiration without rules or practice, and to devote himself to such self-discipline as is marked out for him by those who have already won their fame. And when by this means he has developed in himself the capabilities herein described, and by his eloquence holds courts and legislatures subject to his will, he will realize at last that oratory is the noblest of all human arts, and that the orator is not born, but made.

APPENDIX I.

COMPENDIUM OF LOGIC.

THE human intellect performs three operations: (1) It apprehends, or perceives; (2) It judges, or asserts; (3) It reasons, or by comparing two things with a third infers their agreement or disagreement with each other.

An act of apprehension expresses itself in a word or term denoting some object visible or invisible. An act of judging expresses itself in a proposition composed of a subject, a predicate, and the verb "is," in which the condition or attribute indicated by the predicate is affirmed of the subject. An act of reasoning expresses itself fully in three propositions, in the first of which one of the two things is compared with the third; in the second, the other of the two things is compared with the third; in the last, the identity or diversity of the two things is asserted.

An act of reasoning is founded on the following self-evident truths: (1) In just such proportion as two things agree with the same third thing they will also agree with each other; (2) In just such proportion as two things differ in the degree of their agreement with the same third thing, they will disagree with each other. For example: Two sticks agree in length with the same foot-rule. Each of course will agree in length with the other. Again, of two sticks one agrees in length with a foot-rule, the other is but half as long as the foot-rule. Of course one stick will be only half as long as the other. But it is not true that, if two things disagree with a third thing, they will also disagree with each other. Two sticks, for instance, disagree in length with a foot-rule. But nevertheless each may be two feet long, or of any other equal length. Or one may be any number of times longer than the other. In an act of

reasoning founded on these truths, one of the two things compared must, therefore, always agree with the third thing. If the other also agrees with the third thing, the two compared things agree with each other. If the other differs from the third thing, the two compared things differ from each other. All human reasoning, to whatever subject it may relate, is merely the repetition of this simple method of comparison, in accordance with these fundamental truths.

The complete expression of an act of reasoning is called a *syllogism*. The first proposition is known as the *major premise*; the second, as the *minor premise*; the last as the *conclusion*. The three things involved in the comparison are called *terms*; the third, with which the two others are compared and which does not appear in the conclusion, being the *middle term*; that one of the other two which forms the subject of the conclusion being the *minor term*; and that which forms the predicate of the conclusion being the *major term*. Take this syllogism, for example:

Major premise: Every tyrant is a person deserving of death;

Minor premise: Nero is a tyrant;

Conclusion: Therefore, Nero is a person deserving of death.

Here, the middle term is "tyrant," the minor term is "Nero"; the major term is "a person deserving of death." In the major premise, the middle term is compared with the major term, and the identity of "tyrant" with "a person deserving of death" is asserted. In the minor premise, the middle term "tyrant" is compared with the minor term "Nero," and the identity of "Nero" and "tyrant" is affirmed. In the conclusion, the minor and major terms, having been found to be identified with the middle term, are declared to be identified with each other.

Although an act of reasoning can be fully expressed only in the form of a syllogism, which completely describes its terms as things capable of comparison with one another, yet in actual reasoning abbreviations of these descriptions are commonly employed. Thus, in the foregoing syllogism, the propositions may be more succinctly stated as follows:

Every tyrant deserves death ;
Nero is a tyrant ;
Therefore, Nero deserves death.

It may at first seem difficult to compare the term "tyrant" with the term "deserves death," this latter phrase as it stands expressing rather a quality than a thing. But if "deserves death" be amplified to contain its entire meaning as "a person who deserves death," the difficulty disappears. Such amplification can be made in every case, where the brevity of the proposition excludes words necessary to represent the terms as things concerning which identity or diversity can be asserted. For example: "Every virtue is commendable" signifies "Every virtue is a thing which deserves to be commended"; "Every man is an animal" is equivalent to "Every man is a being possessing the attributes of an animal," etc.

So also the form of the syllogism may be abandoned, and the act of reasoning may be expressed in a single proposition, called an *enthymeme*. For example: "Nero deserved death because he was a tyrant"; or, "Nero was a tyrant, and therefore deserved death." This is a sufficient statement for any reasoning process concerning the truth of whose premises, and the certainty of whose conclusion, there is no doubt. But whenever the truth of the premises or the certainty of the conclusion is disputed, the act of reasoning should be expressed in complete syllogistic form, with each of its terms fully described, in order that the tests of truth and certainty may be applied.

An act of reasoning may be defective in one or both of two ways: First, when the assertion of the premises concerning the agreement of the major and minor terms with the middle term is untrue; Second, when the conclusion does not follow from the premises. The first defect is occasioned either by falsehood in the major or the minor premise taken separately, or by using the middle term in one aspect when comparing it with the major term, and using it in a different aspect when comparing it with the minor term. If the defect results from falsehood in the individual premises, they do not warrant any conclusion whatever, even though in words they may appear to do so. For example:

Every tyrant is dead;
 Cesar was a tyrant;
 Therefore Cesar is dead.

Here the major premise is, and the minor premise may be, false in fact; and if so, the conclusion has no basis in the argument, though as an independent statement it may be true. Such falsehood in the individual premises may arise from the following causes.

First, the whole premise may be a pure assumption, as in the *vicious circle*, where each of two propositions is proved by the other, or in the *false supposition*, where a fact unproved is taken for granted, or in the *petitio principii* or *begging the question*, where the conclusion is a mere repetition in other language of one of the premises.

As an example of the vicious circle :

If the sun is stationary, the earth turns on its axis;
 But the sun is stationary;
 Therefore, the earth turns on its axis.
 If the earth turns on its axis, the sun is stationary;
 But the earth turns on its axis;
 Therefore, the sun is stationary.

The vicious circle requires at least two syllogisms in which the conclusion of each is taken as a premise of the other. As seen in this example, the truth of each conclusion is dependent on the truth of the other, and hence neither derives any support from the apparent argument.

For an example of the false supposition :

Any addition to the bulk of the matter contained in a vessel already full will cause it to overflow;
 To place a fish in a vessel full of water will not cause it to overflow;
 Therefore, to place a fish in a vessel full of water adds nothing to the bulk of the matter which it contains.

Here the minor premise is a false supposition, and the conclusion is consequently false.

As an example of begging the question :

Everything that has weight is ponderable;
 A stone has weight;
 Therefore, a stone is ponderable.

Here the conclusion and the minor premise are identical in meaning, though differing in words.

Secondly, falsehood arises by assuming that one thing is the effect of another because the two were coincident in time, place, or circumstances. For example:

Every person who is mortally wounded, and dies, is slain by the inflicter of the wound;

The deceased was mortally wounded by the accused, and died;

Therefore, the deceased was slain by the accused.

Here the major premise may be false, for death following a mortal wound is not necessarily caused by it, and the conclusion therefore is not reliable.

Thirdly, the falsehood may arise from ignoring the real question in issue, and attempting to prove or disprove something else which apparently, but not actually, includes it. This is called the *ignoratio elenchi*. For example, if one should thus argue against the immortality of the human soul:

Whatever is eternal has neither beginning nor end;

The human soul has a beginning;

Therefore, the human soul is not eternal.

This syllogism ignores the real question, which relates not to eternity but to immortality, with which the idea of a beginning is not incompatible.

Fourthly, the falsehood may result from confounding the essential attributes of a thing with its accidental qualities. For example:

Everything from which evil comes is bad;

Evil comes from the enforcement of law;

Therefore, the enforcement of law is bad.

Here the major premise, if true in fact, must signify that the evil comes necessarily and inevitably from the thing mentioned. But the minor, if true, asserts not that evil inevitably and necessarily comes from the enforcement of law, but only as its accidental and occasional consequence, and thus lays no foundation for the subsequent conclusion.

Fifthly, falsehood occurs from confounding what is simply and universally true of a thing with what is true in a certain respect only. For example:

Every one who intentionally takes the life of another wishes his death;

The sheriff intentionally takes the life of the condemned;

Therefore, the sheriff wishes the death of the condemned.

It is true in a certain respect that the intentional slayer wishes the death of his victim, since the will is involved in every intentional act. It is also true that the sheriff wishes to perform his official duty, which includes the execution of the condemned, and hence in that respect wishes the death of the condemned. But it is not necessarily nor generally true that the slayer wishes, in the simple, universal sense, that the life of his victim should be sacrificed.

These five causes of falsehood cover most instances in which the individual premises can be untrue. The reasoner falls into these falsehoods either by not formulating his syllogism at all, or by stating its premises in ambiguous language; for it is scarcely possible that an examination of his argument, after he has reduced it to a syllogistic form and carefully expressed each of its terms, should not at once reveal to him both his error and its cause.

When the individual premises are both true in themselves, but the middle term in one is taken in a different aspect from that contemplated in the other, they furnish no ground for any conclusion. This defect is known as the *ambiguous middle*. For example:

Every tyrant deserves death;

Cesar is a tyrant;

Therefore, Cesar deserves death.

If the word "tyrant" is used in each of these premises to express the same thing, the reasoning is correct. But if in the major premise it means a cruel and unjust monarch, and in the minor premise simply a severe and energetic administrator of the law, it is obvious that the two propositions, though severally true, are falsely taken as related to each other; that the major and minor terms are not really compared with any one middle term, although in words they seem to be; and hence that no conclusion can be drawn from them.

To guard against these two phases of the first error in reasoning, a thorough knowledge of the subjects considered, and a

correct employment of the words used in defining the terms, and especially the middle term, are necessary. Without these no certainty of conclusion ever is or ever can be reached. Most of the failures to arrive at truth which attend the efforts of those who conscientiously seek it result from one or the other of these mistakes, and would be avoided if their reasoning processes were characterized by less haste in drawing their conclusions, and more care in investigating their subjects and in accurately defining their major, minor, and above all their middle terms.

The defect which consists in drawing a conclusion that does not follow from the premises may arise from several causes. One of these is the employment of an *undistributed middle term*. A term is distributed when it is so used as to include every object to which it can be applied. In the phrases "Every man," "All men," "No man," the term "man" is distributed; in the phrases "Some men," or "Men" if including less than all men, it is undistributed. When the middle term is not distributed in either of the premises, no statement is made in either which necessarily identifies the major term with the same part of the middle term with which the minor term is identified, and hence the terms are not compared with the same standard, and no true act of reasoning is performed. But if in either premise the middle term is distributed, and is thereby affirmed universally of the major or the minor, then, inasmuch as the whole necessarily includes the parts, an affirmation of the identity of the other term with the middle to any extent identifies it to the same extent with the former term, and also to that extent warrants the conclusion. For example:

Some tyrants deserve death;
Nero was a tyrant;
Therefore, Nero deserved death.

Here the middle term "tyrant" is distributed in neither premise, and it is evident that the conclusion is erroneously drawn, since Nero might or might not have been among the "some tyrants" of the major premise. But if the middle term had been distributed in the major premise, and it had asserted that "All tyrants deserve death," the conclusion would have been impregnable. Or in another example;

Man is a biped without feathers;
 A plucked goose is a biped without feathers;
 Therefore, a plucked goose is a man.

The middle term "biped without feathers" is undistributed. If it were stated, "Every biped without feathers is a man," instead of, as in effect it is affirmed, that "Some bipeds without feathers are men," the syllogism would have been sound on its face, and the conclusion would have legitimately followed, its sole defect being the falsehood of the major premise. This error of the undistributed middle is the most common of all the second class of defects, but it misleads only when concealed in the words employed by the reasoner. If his act of reasoning be expressed in syllogistic form, his mind will instinctively rebel against the conclusion; although he may not be able to point out the defect, or designate it by its proper name.

Another defect of this class is caused by distributing in the conclusion a term which has not been distributed in either of the premises; by this means asserting in the conclusion a universal identity, where only a particular identity had been affirmed in the premises. This fault is sometimes called *illicit process*. For example:

All tyrants are dead;
 Cesar was not a tyrant;
 Therefore, Cesar is not dead.

In this syllogism the term "not dead" is distributed in the conclusion, meaning "No dead man is Cesar." In the major premise it is undistributed, signifying that such men as were tyrants are dead, but not affirming that other men who were not tyrants are not also dead. To warrant the conclusion the major premise should have been, "All dead men were tyrants," or, "No men except tyrants are dead," which would have been manifestly untrue. Again:

All tyrants deserve death;
 Roman emperors were tyrants;
 Therefore, all Roman emperors deserve death.

The minor premise, if true, refers to some Roman emperors only, but the conclusion improperly distributes the term, and renders the reasoning defective. Illicit process is, like the undistributed middle, an error which the intellect easily de-

tects, if the syllogism containing it is written out and carefully considered.

A third defect arises when a conclusion is based upon two negative premises. In such a case, the major and the minor terms are both affirmed not to agree with the middle term. It does not follow from this, however, that they do or do not agree with one another. For example :

No British sovereigns were tyrants ;
 Cesar was not a British sovereign ;
 Therefore, Cesar was a tyrant ; or
 Therefore, Cesar was not a tyrant.

One of these conclusions follows from the premises as well as the other, but neither is justified by the premises.

A fourth defect consists in drawing a negative conclusion from two affirmative premises. Such a conclusion cannot be correct, for where the premises affirm the agreement of the major and minor terms with the middle term, the only possible result is the affirmation of agreement between the major and the minor. But the major or minor premise of a syllogism may be negative in substance, though stated in affirmative words, and a negative conclusion may then be properly drawn from them. For example :

Patriots alone deserve well of their country ;
 Catiline was a traitor ;
 Therefore, Catiline did not deserve well of his country.

Here the major and minor premises are negative with respect to each other, though affirmative in form. "Traitor" is equivalent to "not a patriot." "Patriots alone" is equivalent to "No traitors." Where the apparently affirmative terms thus express negative ideas, a negative conclusion may be supported, but not otherwise.

A fifth defect occurs when both premises are particular. From such premises no conclusion follows. For example :

Some Roman emperors were public benefactors ;
 Some tyrants were Roman emperors ;
 Therefore, some tyrants were public benefactors.

Here there is no comparison of the major and minor terms with the same middle term, for the Roman emperors who were tyrants are not asserted to be the same Roman emperors who

were public benefactors. In most instances this defect embraces that of an undistributed middle term.

These various defects in an act of reasoning are called *sophisms*, or *fallacies*, and are to be met with in every species of composition in which questions are investigated and conclusions are apparently attained. The modern methods of discussion, which discard the formal definitions and divisions of the scholastic writers, together with the copiousness of the English language and its abundance of equivocal and synonymous phrases, tend to render our discourse inexact, and to produce those fallacies of expression which soon become fallacies in thought itself. Hence it is not surprising that our dissertations in theology and law and science, the sermons of our preachers, and even the opinions of our highest courts, are sown with them, and that no student of our day is warranted in accepting any new conclusion, until he has submitted it to logical analysis and satisfied himself that its premises are individually and collectively true, and that it is legitimately derived from them.

All correct syllogisms are reducible to four forms; two furnishing affirmative conclusions, and two furnishing negative conclusions. In all these the major premise distributes the middle term. In the first and second the minor term is distributed, in the third and fourth it is taken as to part of its content only. For example:

1. All tyrants deserve death;
All Roman emperors were tyrants;
Therefore, all Roman emperors deserved death.
2. No tyrants are public benefactors;
All Roman emperors were tyrants;
Therefore, no Roman emperors were public benefactors.
3. All tyrants deserve death;
Some Roman emperors were tyrants;
Therefore, some Roman emperors deserved death.
4. No tyrants are public benefactors;
Some Roman emperors were tyrants;
Therefore, some Roman emperors were not public benefactors.

Every reasoning process is capable of expression in one of these syllogisms, and when so expressed is also capable of

investigation by the application of the tests which disclose whether or not it is tainted with any of the fallacies heretofore described.

In actual discourse different syllogisms are frequently combined, and their propositions are then usually expressed in condensed or cumulative forms. Of such combinations there are two: the *sorites* and the *dilemma*. In the *sorites* several conclusions of unexpressed premises are strung together in a series, in which each conclusion is used as the premise of the next, and the final conclusion is predicated of the original subject. For example:

He who will not work will have no money;
He who has no money will have no food;
He who has no food will starve;
He who starves will die;
Therefore, he who will not work will die.

In the *dilemma* the argument is stated as two contrary suppositions, one of which must be true, while the conclusion follows from either. For example:

He who says he is a liar, when he says it ~~either~~ does or does not tell the truth;
If he tells the truth, he is a ~~liar~~;
If he does not tell the ~~truth~~, he is a liar;
Therefore, ~~in~~ ~~either~~ case, he is a liar.

Such an argument is defective unless the two divisions of the *dilemma* cover every possible aspect of the matter asserted, and unless the intermediate conclusion is inevitable. In the above example, if a man could make a statement in which he neither lied nor told the truth, or if either the second or third proposition was doubtful, the argument would fail. Every *dilemma* is reducible to two or more syllogisms.

In conducting his own reasoning processes, and in analyzing those of others, the scholar encounters his greatest difficulty in the selection or discovery of the appropriate middle term. The conclusion which he wishes to attack or defend supplies him with the major and the minor terms. The middle term in the first and third forms of the syllogism is identified with both the major and the minor terms. In the second and fourth, it is affirmed of the minor term and denied of the major. In each conclusion

the minor term is the subject of the proposition, and the major term is the predicate. The discovery of a middle term for the first and third forms of the syllogism thus requires that some fact or law should exist which can, at the same time and in the same sense, be the predicate of the minor term and the subject of the major term. For example, a middle term is sought for the conclusion, "All Roman emperors deserved death." "All Roman emperors" is the minor term, "deserved death" is the major term. Now what can be predicated of all Roman emperors and at the same time can be said to deserve death? We have selected "tyrants," but any other term having the same requisites would have been equally suitable; as, for instance, "murderers," or "traitors," etc. In the second and fourth forms of the syllogism the term selected for the middle term must be predicate of the minor term, but must not be the subject of the major. For example, the conclusion sought is, "No Roman emperors were public benefactors." The term "tyrants" can be predicated of "Roman emperors," but cannot be the subject of the predicate "were public benefactors," and to affirm it of the former is therefore to deny to them the character of the latter. The discovery of the middle term thus depends upon the knowledge of the reasoner concerning his subject matter; and the soundness of his argument is measured, other things being equal, by the fitness of his middle term for its purpose, and the accuracy with which it is defined.

The foregoing rules for securing correctness and avoiding fallacies in reasoning have been summed up in the following manner:—

1. The syllogism must contain, both in words and meaning, three and only three terms.
2. No term must possess in the conclusion a wider application than it possesses in the premises.
3. The middle term must never appear in the conclusion.
4. The middle term must be distributed or asserted in its widest application in at least one of the premises.
5. From two affirmative premises no negative conclusion can be drawn.
6. From two negative premises no conclusion whatever can be drawn.

7. From two particular premises no conclusion can be drawn.
8. The conclusion is never more certain than the least certain premise.

Practice in reducing the arguments found in briefs, decisions, and other discussions to syllogistic forms, and in testing them by these rules as explained in the foregoing pages, will soon familiarize the student with accurate logical methods, and enable him to guard against the errors which he thus learns to detect in the reasonings of others.

APPENDIX II.

CHARACTERISTICS OF ANCIENT ORATORY.

THE study of the orations of antiquity, particularly those of Cicero and Demosthenes, will never cease to be an important part of the education of the orators of every future age. To the advocate their frequent critical examination is extremely valuable on account of three characteristics in which they all excel; viz. their brevity, their careful selection of ideas, and their elegance of style.

The brevity of these orations places them in striking contrast to the majority of those which now proceed from the platform, the pulpit, and the forum. The Select Orations of Cicero, as they are called, number twenty-seven. But four of these occupy over an hour in their delivery, none more than one hour and a half. Eight consume from a half-hour to an hour; seventeen, a half-hour or less. Of the public orations of Demosthenes, not including that on the Crown, there remain sixteen, none of which exceeded three quarters of an hour, thirteen requiring a half-hour or less, and two but fifteen minutes. A comparison in this respect between these and the interminable discourses inflicted upon their audiences by modern preachers, advocates, and statesmen, may go far toward explaining the difference in the degree of influence exerted by them on the minds and hearts of those to whom they were addressed.

A careful selection of ideas, and the consequent rejection of every superfluous thought, is of course essential to the attainment of brevity. Upon this point also the diversity between ancient and modern oratory is very marked. Our orators, of whatever species, seem to aim at an exhaustive discussion of their subject, as if it were the purpose of oratory to furnish

to the auditor every accessible item of information. Not so with the great orators of old. The student of their epochs and surroundings easily discerns multitudes of ideas which might have entered into their orations, had they seen fit to employ them, and at the same time he is impressed with the wonderful sagacity displayed in their adoption of those, and those only, which were calculated to make the most intense impression on their hearers. In the oration of Demosthenes on the Chersonese, regarded by many scholars as the best of his public efforts, the considerations urged upon his audience are singularly few and simple. Between Athens and Philip a nominal peace then prevailed. An Athenian army on the borders of Thrace, commanded by Diopithes, had become involved in disputes with the Cardians, whom Philip had assisted. Philip wrote to Athens, demanding the recall of the army, and compliance with this demand was advocated by many Athenian citizens, either through fear of Philip or through secret sympathy with his designs. Demosthenes opposed it, and counselled the support of Diopithes with supplies and men, as necessary for the protection of Athens itself. Numerous were the ideas at his command, suggested by the past and present relations of the contending parties, but of these the oration contains only the following:—

“Between Philip and Athens there must be either peace or war. Philip hates us, our country, and our constitution, which are the only barriers against his universal despotism. All his operations everywhere are directed ultimately against us, and he will not permit us to have peace. His sympathizers here assert that they want peace, and blame us for preferring war; but they desire only delay in order that Philip may, as he has always done, derive some advantage from our inaction. You, Athenians, seem willing to believe anything rather than that Philip means war, and your supineness threatens to be your destruction. Think of your lost opportunities and his aggressions, and remember that this is to us a struggle for existence, as the fate of other Greek states clearly shows. Whoever is resisting Philip is, therefore, acting on our behalf and for our benefit. Just now, the army of Diopithes is all that stands between Philip and ourselves. Philip no doubt wants him recalled. But we ought to strengthen and support him; and though to do it may cost much, it will cost still more if we neglect it. This advice may not be agreeable for you to follow, but I prefer to counsel you to do that which is honorable and safe.”

Another example is the oration of Cicero on behalf of Ligarius, whom Cesar had determined to condemn as an adherent of Pompey, but for whom this renowned speech of Cicero won forgiveness. The prosecutors of Ligarius, as well as Cicero himself, had also espoused the cause of Pompey, but had submitted to Cesar and been pardoned. The appeal of Cicero for Ligarius consists almost entirely of the ideas suggested by this fact. He says:—

“Ligarius was guilty of the same fault that we, his prosecutors and defenders, were; but we were more guilty than he because he was drawn onward by circumstances while we acted from choice. It was a mistake in all of us, but we were prompted by a sincere regard for the state, and on that account you have pardoned us, and have had no reason to repent of your kindness. Your clemency toward us has been so great that you cannot deny the same favor to him, especially when so many of your best and most faithful friends desire it, and when his pardon will unite his whole family to you in the strongest ties of allegiance.”

These examples, which might be increased by similar analyses of all the other speeches of these orators, exhibit the practical application of that rule of oratory which requires the presentation of a few indisputable arguments that are at once intelligible and acceptable to the hearers, and the rejection of every thought which is obscure, or doubtful, or superfluous.

To compose an oration of these simple materials, and to urge these thoughts again and again upon their auditors without seeming repetition, required the highest degree of rhetorical skill. To appreciate to its full extent the excellence of style attained by these orators, familiarity with the language in which they spoke is necessary. But even the student who must content himself with good English translations cannot fail to perceive what masters of the art of rhetoric they had become, or to be convinced that what Cicero says of his own constant cultivation of that art must have been true. Examples of almost every figure of thought or words can be found in his orations, impaired in beauty sometimes by transmutation into our Anglo-Saxon tongue, but still manifesting the immense resources of language for the varied and effective expression of ideas. The style of Demosthenes is less ornate than that of Cicero, but the

care with which he chose his words and framed his sentences appears not only in the diction of his separate orations, but in his method of selecting the choicest phrases of one already delivered and incorporating them, still further polished and strengthened, into another. Rarely ever can any poet have revised and pruned and harmonized his swelling numbers with more assiduity or more success than did these two orators the words and sentences which were to be uttered but once only, and that within the compass of a single hour. It is perhaps in this respect more than in any other that modern oratory differs from the ancient. In multiplicity of ideas, in quantity of words, we far exceed them; an excess which, judged by oratorical standards, is however no evidence of merit. But in the selection of intelligible and attractive words, in their collocation into sentences possessing clearness, unity, harmony, and strength, and in the construction and use of rhetorical figures, our speeches bear no comparison with theirs. This inferiority is partly due to the wide adoption of the habit of extemporaneous speaking, and partly to the haste and carelessness with which most of our written orations are composed. Such methods of preparing, or of not preparing, orations are mistakes into which the orator is led by his erroneous view of the proper scope of his oration and of the time he ought to occupy in its delivery. The three faults of modern oratory, like the three excellences of ancient oratory, are indissolubly linked together. Prollixity, diffusiveness and complexity of thoughts, and a loose, rambling, uncultivated diction, proceed from a lack of the same diligence, discernment, and discretion which produce brevity, simplicity, and elegance of style. The return to either of these excellences without a return to the others is, therefore, practically impossible. When an orator properly selects his ideas, putting aside all that is not actually useful for his purpose, his speech will necessarily be brief, and in its preparation no such haste will ordinarily be required as to prevent his language from expressing his ideas with an appropriate perspicuity and grace.

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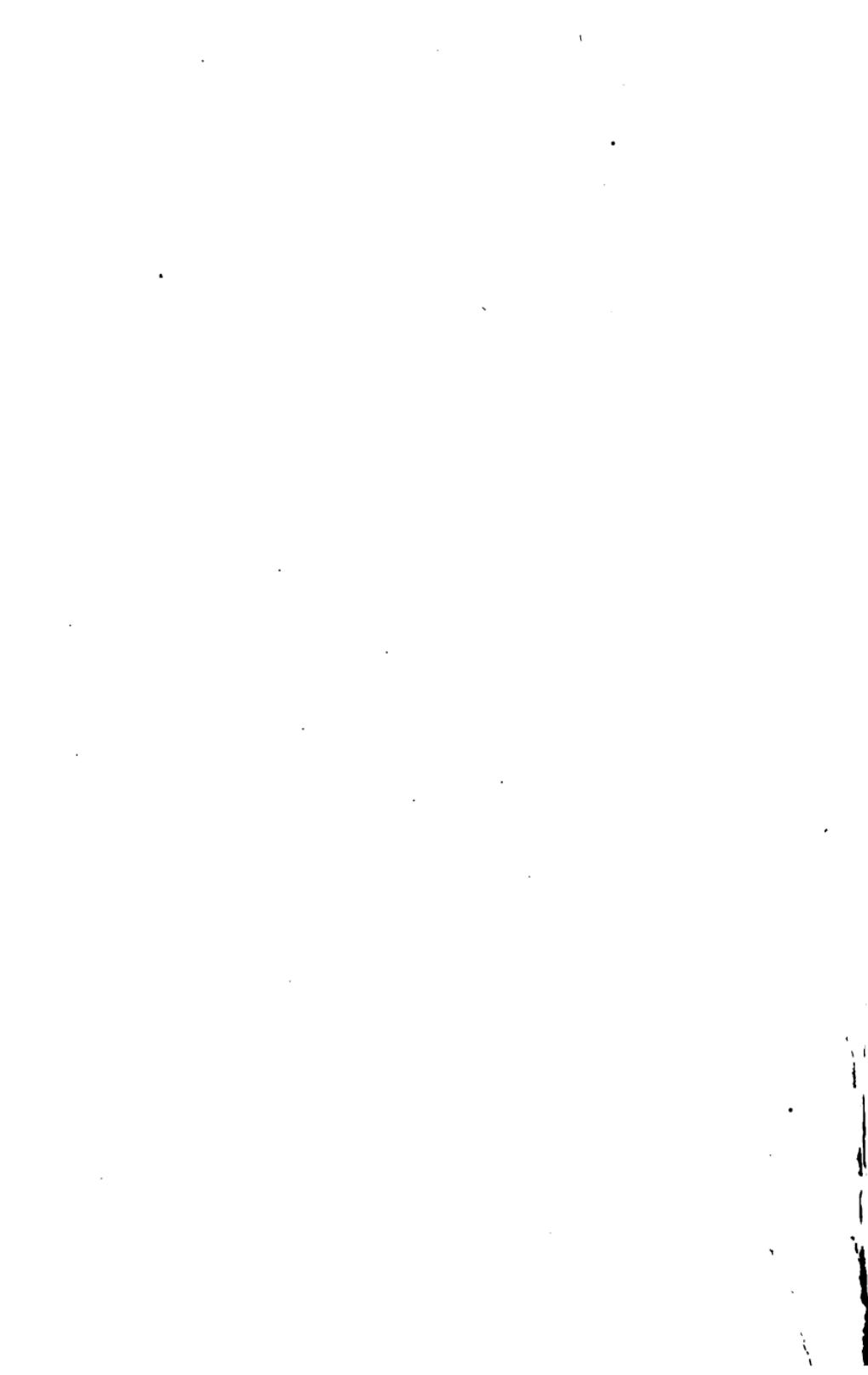
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Read 2 Bl. Comm., pp. 107, 179, 200, 201.

1 Wash. R. P., B. i, Ch. xiii, Sec. 1, § 1.

2 Wash. R. P., B. ii, Ch. i. Sec. 1, § 18.

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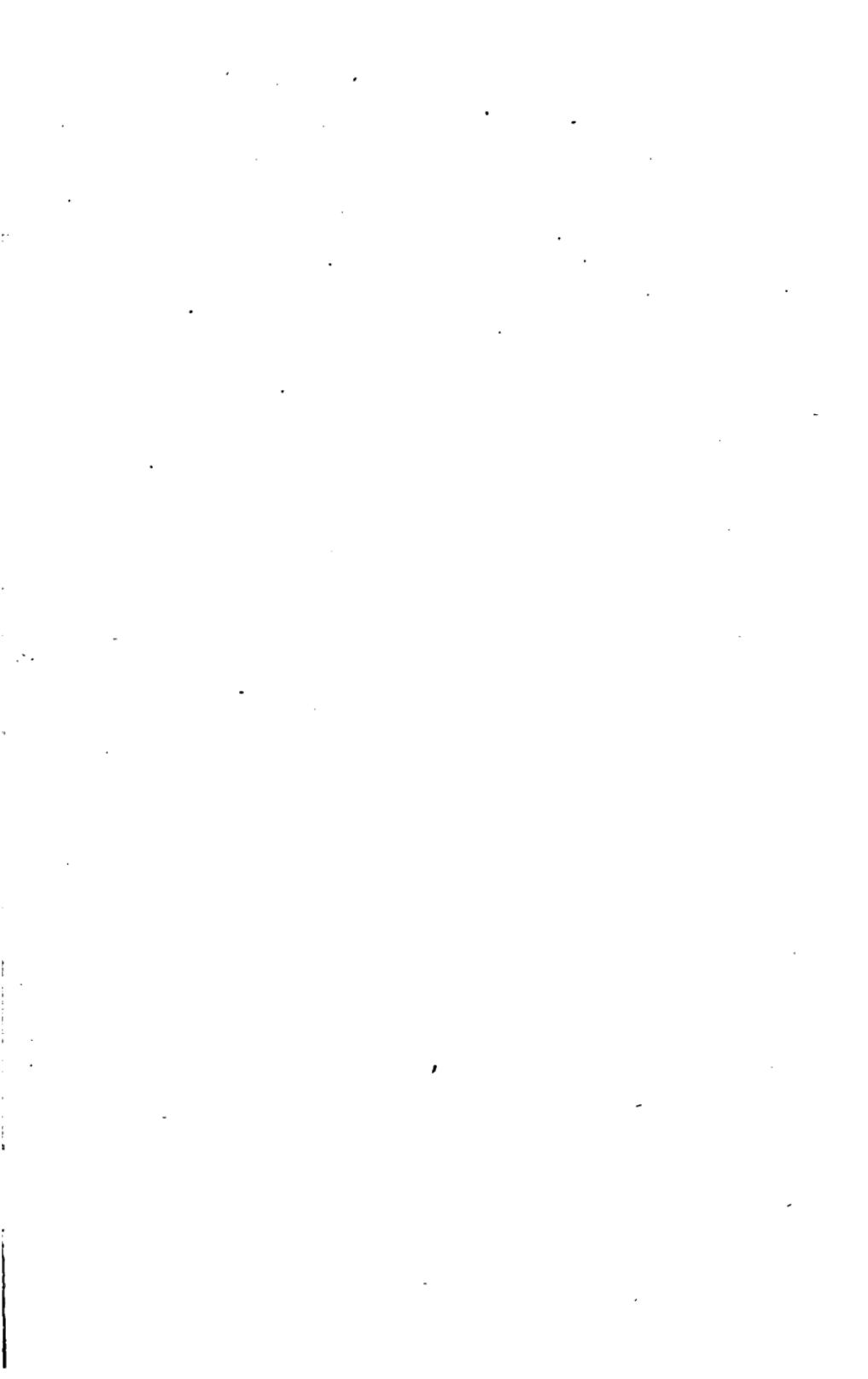
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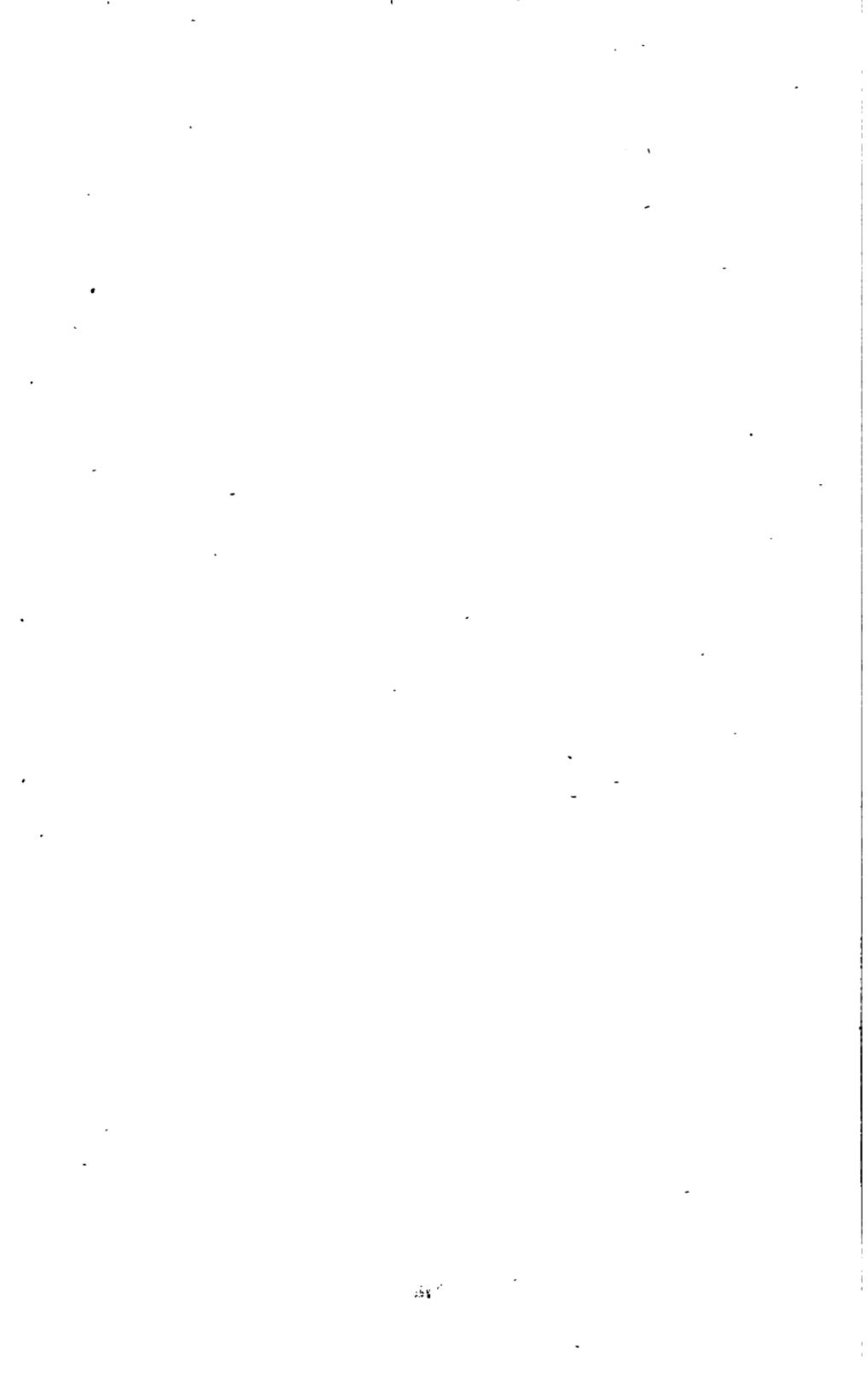
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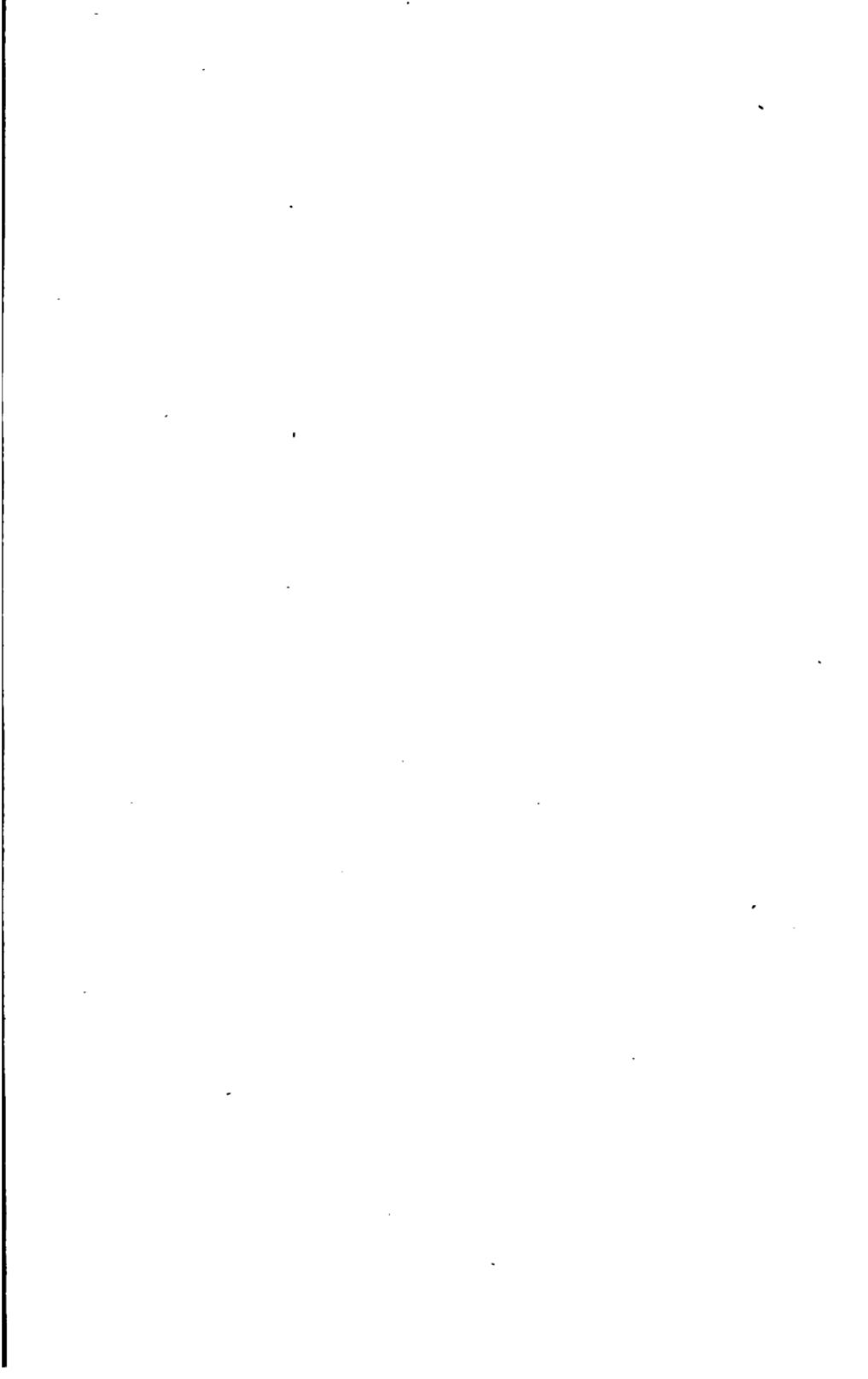
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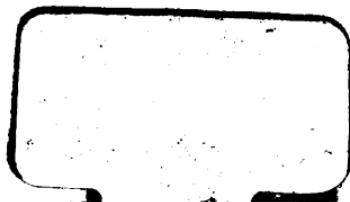


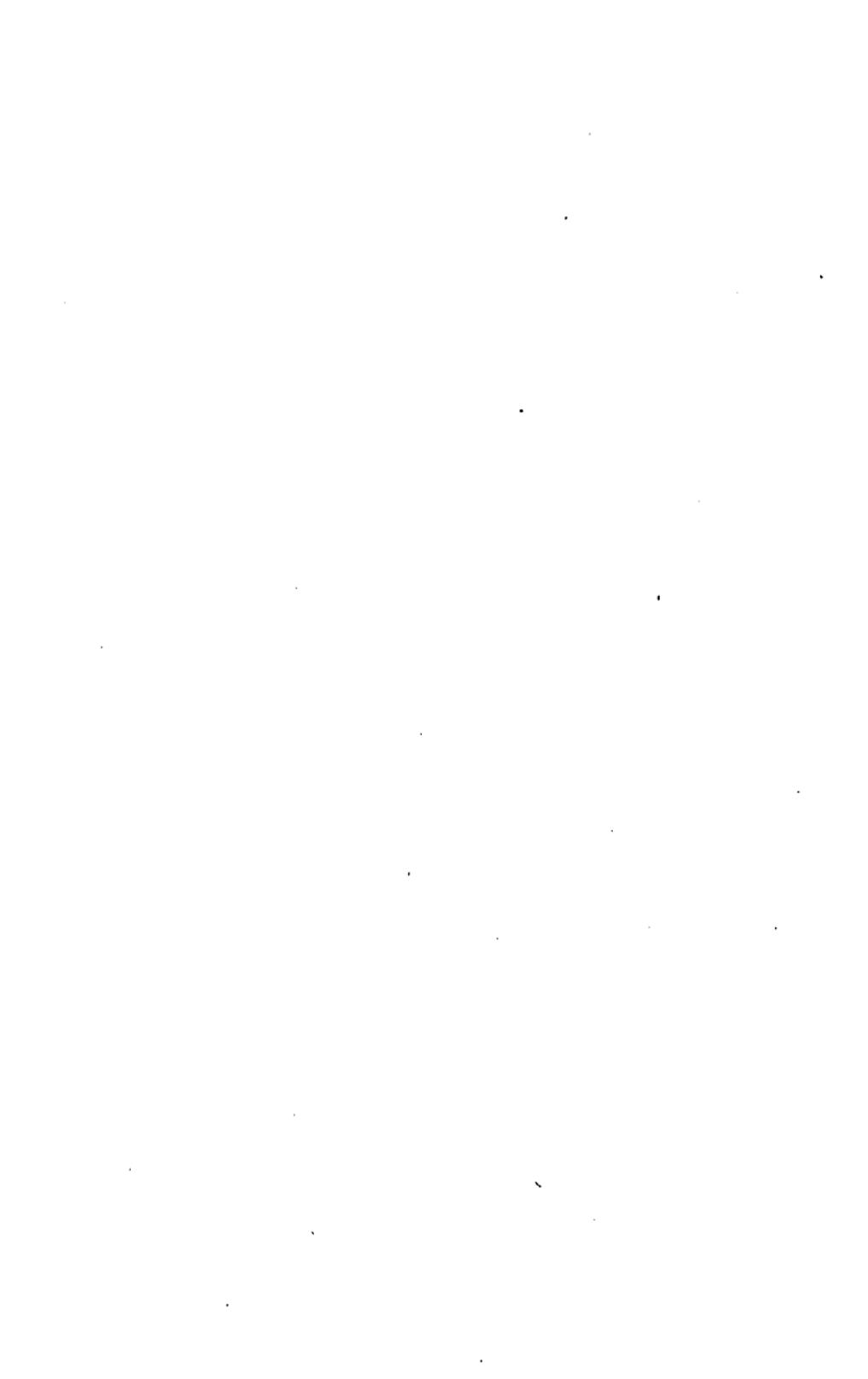






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